Supreme Court, U.S.
FILED

MAR 2 - 2010

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 09-[illegible]

In The
Supreme Court of the United States

BOBBY LEE CUTTS, JR.,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals Fifth Appellate District of Ohio

PETITION FOR WRIT OF CERTIORARI

FERNANDO MACK, ESQ.
REG. NO. 0062937
MYRON WATSON, ESQ.
REG. NO. 0058583
Counsel of Record
420 LAKESIDE PLACE
323 WEST LAKESIDE AVENUE
CLEVELAND, OHIO 44113
(216) 556-9610
(216) 575-7664 (FAX)
losmacks@msn.com

Attorneys for Petitioner

March 2, 2010

Becker Gallagher · Cincinnati, OH · Washington, D C · 800.890 5001

QUESTIONS PRESENTED FOR REVIEW

I WHETHER A JURY VERDICT THAT WAS INCONSISTENT ON ITS FACE AND WAS NOT SUPPORTED BY THE EVIDENCE SHOULD HAVE BEEN SET ASIDE BY THE COURT?

II WHETHER THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS DENIED WHEN A CHANGE OF VENUE WAS NOT GRANTED, ALTHOUGH PRE-TRIAL PUBLICITY WAS SO PERVASIVE THAT THE JURY VENIRE KNEW ABOUT THE CASE IN GREAT DETAIL?

III WHETHER A JUROR WHO PARTICIPATED IN THE SEARCH OF THE VICTIM SHOULD HAVE BEEN EXCUSED FOR CAUSE?

IV WHETHER A DUE PROCESS VIOLATION OCCURRED WHEN THE TRIAL COURT FAILED TO GIVE A LESSER INCLUDED JURY INSTRUCTION OF INVOLUNTARY MANSLAUGHTER?

V WHETHER THE TRIAL COURT'S FAILURE TO USE A LEGALLY RECOGNIZED ALTERNATIVE METHOD TO ENSURE A JURY THAT WAS A FAIR CROSS-SECTION OF THE COMMUNITY WHEN IT WAS DEMONSTRATED THAT THE PRIMARY METHOD OF SELECTING REGISTERED VOTERS FAILED TO ACHIEVE A DIVERSE JURY PANEL?

VI WHETHER DUE PROCESS WAS DENIED WHEN THE TRIAL COURT DENIED PETITIONER'S REQUEST FOR GRAND JURY TESTIMONY?

VII WHETHER THE OUT-OF-COURT HEARSAY STATEMENTS MADE BY A TWO-YEAR OLD CHILD VIOLATED PETITIONER'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT?

VIII WHETHER THE STATE'S UNRESTRICTED USE OF IRRELEVANT AND INFLAMMATORY CHARACTER EVIDENCE DENIED THE PETITIONER A FAIR TRIAL?

IX WHETHER A DUE PROCESS VIOLATION OCCURRED WHEN MAXIMUM AND CONSECUTIVE SENTENCES WERE IMPOSED, ALTHOUGH THE CONVICTIONS WERE ALLIED AND SHOULD HAVE BEEN MERGED FOR SENTENCING PURPOSES?

X WHETHER THE PETITIONER WAS DENIED A FAIR TRIAL DUE TO THE TRIAL COURT'S FAILURE TO DISMISS THE CAPITAL SPECIFICATIONS OF THE INDICTMENT?

TABLE OF CONTENTS

PAGE

Questions Presented For Review i

Table of Authorities vi

Opinions Below 1

Statement Of The Grounds On Which The Jurisdiction Of This Court Is Invoked 1

Constitutional And Statutory Provisions 1

Statement Of The Case and Facts 4

Arguments Relied On For Allowance Of Writ 7

Argument No. I: THE JURY'S VERDICTS WERE INCONSISTENT SINCE ONE ACT AND A SINGLE ANIMUS RESULTED IN BOTH THE DEATHS OF DAVIS AND THE UNBORN FETUS. THUS, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE DIFFERENT VERDICTS AS A MATTER OF LAW, THUS A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN ENTERED FOR THE PETITIONER. 10

Argument No. II: AN ACCUSED IS ENTITLED TO A CHANGE OF VENUE WHEN IT WAS CLEARLY EVIDENT THAT THE JURY HAD BEEN SO EXPOSED BY PRE-TRIAL PUBLICITY THAT THE JURY HAD DETAILED KNOWLEDGE OF THE CASE. . 14

Argument No. III: A JUROR WHO PARTICIPATED IN THE SEARCH OF THE VICTIM SHOULD HAVE BEEN EXCUSED FOR CAUSE AS A MATTER OF LAW, AND THUS PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED. 18

Argument No. IV: WHERE THERE WAS UNCONTROVERTED EVIDENCE PRESENTED BY THE DEFENSE THAT THE DEATHS WERE NOT INTENTIONALLY CAUSED, IT IS A DUE PROCESS VIOLATION WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER. 20

Argument No. V: AN ALTERNATIVE METHOD OF USING OHIO DRIVER'S LICENSE RECORDS TO EXPAND THE PROSPECTIVE JURY VENIRE SHOULD HAVE BEEN UTILIZED TO ENSURE A JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS. 22

Argument No. VI: A REQUEST FOR GRAND JURY TESTIMONY SHOULD BE GRANTED WHEN THERE IS A PARTICULARIZED NEED DEMONSTRATED BY THE PETITIONER, AND A DENIAL OF SUCH IS A VIOLATION OF DUE PROCESS. 24

Argument No. VII: THE ADMISSION OF THE OUT-OF-COURT HEARSAY STATEMENTS PURPORTEDLY MADE BY A TWO (2) YEAR OLD CHILD VIOLATED THE PETITIONER'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT. 27

Argument No. VIII: THE STATE'S UNRESTRICTED USE OF CHARACTER EVIDENCE THAT WAS IRRELEVANT AND INFLAMMATORY, DENIED THE PETITIONER'S RIGHT TO A FAIR TRIAL. . 30

Argument No. IX: IT IS A VIOLATION OF DUE PROCESS WHEN A TRIAL COURT IMPOSES MAXIMUM AND CONSECUTIVE SENTENCES WHEN THE CONVICTIONS ARE ALLIED OFFENSES AND SHOULD BE MERGED FOR SENTENCING PURPOSES. 32

Argument No. X: THE TRIAL COURT'S FAILURE TO DISMISS THE CAPITAL SPECIFICATIONS TO THE INDICTMENT WAS A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS. 33

Conclusion 35

Appendix "A" - Opinion of the Ohio Court of Appeals, Fifth Judicial District, date of journalization July 22, 2009 . . . . . 1a

Appendix "B" - Entry of The Supreme Court of Ohio, denying further Appellant review filed December 2, 2009 . . . . . 101a

TABLE OF AUTHORITIES

PAGE

CASES

Beck v. Alabama,
447 U.S. 625 (1980) 20

Crawford v. Washington,
541 U.S. 36 (2004) 29

Davis v. Washington,
547 U.S. 813 (2006) 29, 30

Estes v. Texas,
381 U.S. 532 (1965) 17

Evitts v. Lacey,
469 U.S. 3877 (1985) 27

Forsythe v. State,
2 Ohio Misc. 99 (1967 C.P.) 16

Hopper v. Evans,
456 U.S. 605 (1982) 20, 21

Irvin v. Dowd,
366 U.S. 717 (1961) 19

Jencks v. United States,
353 U.S. 657 (1957) 26

Johnson v. Luoma,
425 F.3d 318 (6th Cir. 2005) 18

Lockett v. Ohio,
438 U.S. 586 (1978) 27

Person v. Miller,
854 F. 2d 656 (1988) 18

Sheppard v. Maxwell,
384 U.S. 333 (1966) 17

Siler v. Ohio,
543 U.S. 1019 (2004) 29, 30

Smith v. Phillips,
455 U.S. 209 (1982) 18, 19

State v. Adams,
53 Ohio St. 2d 223 (1978) 12

State v. Blankenship,
38 Ohio St. 3d 116 (1988) 32

State v. Cabrales,
118 Ohio St. 3d 54 (2008) 33

State v. Conway,
108 Ohio St. 3d 214 (2006) 12

State v. Gabriel,
170 Ohio App. 3d 393 (2007) 17, 19

State v. Greer,
66 Ohio St. 2d 139 (1981) 25, 26

State v. Gross,
97 Ohio St. 3d 121 (2002) 17

State v. Jenks,
61 Ohio St. 3d 259 (1991) 12

State v. Jones,
78 Ohio St. 3d 12 (1997) 32

State v. Kidder,
32 Ohio St. 279 (1987) 20

State v. Mundt,
115 Ohio St. 3d 22 (2007) 17

State v. Rance,
85 Ohio St. 3d 632 (1999) 32

State v. Thomas,
40 Ohio St. 3d 213 (1988) 20

State v. Thompkins,
78 Ohio St. 3d 380 (1997) 12

Woodson v. North Carolina,
428 U.S. 280 (1976) 23, 27

CONSTITUTIONS

U.S. Const. amend. V 27
U.S. Const. amend. VI 2, 7
U.S. Const. amend. VIII 1, 27
U.S. Const. amend. IX 1, 27
U.S. Const. amend. XIV 1, 27
U.S. Const., Art. 1, §10 14
Ohio Const., Art. 1, §§1, 2, 5, 9, 10, 16 and 20 ... 27

STATUTES

28 U.S.C. 1257 1

Ohio Rev. Code
§2313.08 . . . . . 22, 23, 24
§2901 . . . . . 33, 34
§2901.12(K) 14
§2903 34
§2903.01(B) 3, 4
§2903.01(C) 4
§2903.02(A) 3, 4, 5
§2911.11(A)(1) 3, 4, 5
§2919.22(A) 5
§2927.01(B) 3, 4, 5
§2929.03 23
§§2931.29 - 2931.31 14
§2941.25 . . . . . 32, 33

RULES

Ohio R. Crim. P.
Rule 16 . . . . . 25, 26
Rule 16(B)(1)(g) 2, 26
Rule 18 . . . . . 3, 15
Rule 24 . . . . . 3, 19

Ohio R. Evid.
Rule 403 3
Rule 403(A) 31

OTHER

O. Jur. 3d Criminal Law, Sections 686, 687 15

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

The Petitioner, Bobby Lee Cutts, Jr., respectfully prays that a Writ of Certiorari be issued to review the judgment of the Ohio Court of Appeals for the Fifth Appellate District, originally journalized in this case on July 22, 2009, and made final by order of the Ohio Supreme Court on December 2, 2009, when that Court denied further Appellate review.

OPINIONS BELOW

The Opinion of the Court of Appeals, affirming these convictions, is included in the *Appendix* as **Appendix "A."** The Order of the Ohio Supreme Court is designated as **Appendix "B."**

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment by the Court of Appeals was finalized on December 2, 2009, when the Ohio Supreme Court denied further Appellate review. So postured, the jurisdiction of this Court is being seasonably invoked under **Title 28, U.S.C. 1257 (3).**

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provision of the United States Constitution involved in this case is the Sixth Amendment. Also see Amendments VIII, IX and XIV. The pertinent text of this reads as follows:

> **Amendment VI:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The pertinent provisions of the **Ohio Rules of Criminal Procedure**, provides:

> **Rule 16(B)(1)(g): In camera inspection of witness' statement.** Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.
>
> If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

> Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.
>
> **Rule 18: General venue provisions.** The venue of a criminal case shall be as provided by law; and
>
> **Rule 24: Brief introduction of case.** To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

The pertinent provision of **Ohio Rules of Evidence**, provides:

> **Rule 403: Exclusion mandatory.** Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

The relevant statutes herein, **Revised Code of Ohio, §§2903.01(B), 2903.02(A), 2911.11(A)(1),** and **2927.01(B)**, provide in pertinent part that:

> **§2903.01(B)**: No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery,

robbery, aggravated burglary, burglary, terrorism, or escape;

§2903.02(A): No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

§2903.01(C): No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense;

§2911.11(A)(1): No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: The offender inflicts, or attempts or threatens to inflict physical harm on another;

§2927.01(B): No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

STATEMENT OF THE CASE

Bobby Lee Cutts, Jr., our Petitioner, seeks a review of his convictions for: Two Counts of Aggravated Murder, in violation of **R.C., §2903.01(B)**; One Count of Murder in violation of **R.C.,**

§2903.02(A); One Count of Aggravated Burglary in violation of R.C., §2911.11(A); Two Counts of Gross Abuse of a Corpse in violation of R.C., §2927.01(B), and One Count of Child Endangering in violation of Ohio Revised Code, §2919.22(A). The Petitioner was convicted after a jury trial. The trial Court imposed the recommended sentence of thirty (30) years to life for the aggravated murder of the unborn fetus, and consecutive and maximum sentences on the remaining Counts, which resulted in a sentence of fifty-seven (57) years to life.

On June 15, 2007, Patricia Porter reported that her daughter, Jessie Davis, was missing and the Canton City Police arrived at her residence located at 8686 Essex Drive in Green Township, Stark County. (**Tr., pp. 82-86.**) A police investigation began, which culminated in the discovery of Jessie Davis' body on June 23, 2008, after having been informed of her whereabouts and led to the scene by Petitioner. (**Tr., pp. 312-321.**) During the Trial, the State presented multiple witnesses to testify about the subsequent investigation and examination of the evidence conducted by various members of law enforcement agencies, as well as co-defendant Myisha Ferrell, who testified as to events of the early morning hours of June 14, 2008. Other witnesses for the State were also called to support various theories of its case and the events surrounding the death of Jessie Davis. The Petitioner ultimately testified to the relevant events before and after the death of Jessie Davis.

The Petitioner testified that he met Jessie Davis in 2004 when he had been separated from his wife and admitted that their relationship was intimate. He further acknowledged that she was the mother of his

two (2) year old son, Blake. **(Tr., pp. 156-158.)** Following the birth of their son, their relationship was primarily based on their respective responsibilities as parents, but sometime in 2006 he resumed a brief intimate relationship with Ms. Davis, which resulted in a second pregnancy. **(Tr., pp. 165-166.)** Although Petitioner was unsure as to whether he was the father of the unborn fetus, he communicated his willingness to provide support in the event that it was indeed his child. **(Tr., p. 167.)** He testified that there were frequent periods of contact with his son, Blake, up to and including the week of June 11, 2008. Also, he outlined the specific manner in which the visitations were arranged and conducted by them. **(Tr., pp. 177-180.)**

On the morning of June 14, 2008, Petitioner arrived at Ms. Davis' residence at approximately 5:45 a.m., so that he could pick up his son as previously arranged. **(Tr., pp. 194-195.)** As was his custom and practice he entered the residence through the garage door which was open. **(Tr., p. 197.)** He entered the home and called Ms. Davis' name aloud then proceeded upstairs, where he found Ms. Davis lying on her bedroom floor. **(Tr., pp. 198-199.)** She told him that she was tired and not feeling well, when he asked about her overall condition and their unborn fetus. **(Tr., pp. 199-200.)** The Petitioner acknowledged that he attempted to speed up the process of picking up his son by communicating to her that he was tired, and urged Ms. Davis to hurry up. Ms. Davis told Petitioner that he would not be tired had he not been out partying all night and an argument ensued. **(Tr., pp. 201-202.)** When Petitioner attempted to leave, Ms. Davis grabbed his shirt to prevent him from leaving and the argument escalated. **(Tr., pp. 203-204.)** Ms. Davis bit

Petitioner's finger after he attempted to tease her, which only angered him and he threatened to leave, once more. **(Tr., pp. 205-206.)** At that point, Ms. Davis again positioned herself in front of Petitioner to prevent him from exiting, he pulled his arm away and threw an elbow to free himself from her grasp. Ms. Davis immediately fell to the ground. **(Tr., pp. 206-207.)**

Ms. Davis did not move at all after falling to the ground, and Petitioner's initial belief was that she was faking injury in order to prolong the argument. As Ms. Davis continued to lay on the floor motionless, Petitioner then realized that she was in distress and began efforts to resuscitate her. **(Tr., pp. 211-212.)** The Petitioner panicked when he realized that Ms. Davis was deceased and his only thought was one of disbelief. He testified repeatedly that he had no intention to harm Ms. Davis, and that he could not believe what was occurring. **(Tr., pp. 218-219.)**

The Petitioner then acknowledged that after his efforts to resuscitate the decedent were unsuccessful, he decided to remove her body and leave his son at the home alone. He transported the body to a remote location, and repeatedly denied any knowledge of Ms. Davis' disappearance, until Saturday, June 23, 2008, when he led authorities to the location of the body.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The instant case raises a number of unique and significant legal issues that mandate further appellate review in order to provide guidance and clarification to trial courts throughout the country. In June 2007, the

disappearance of Jessie Davis who was nine (9) months pregnant, generated significant, national, media publicity. The ultimate discovery of her body in a remote location after nine (9) days of searching led to the arrest of Petitioner. And his arrest precipitated a visceral, and emotional public response to the death of an expectant mother. The furor created by the media, was also coupled with public demands for justice. This saturation of media coverage resulted in tainting the potential jury venire that would ultimately decide the fate of Petitioner. While high profile cases do not require the exercise of discretionary jurisdiction by this Court, the lack of fairness of this Trial under the intense glare of media publicity and the public condemnation of Petitioner should be rigorously examined by this Court. Moreover, the trial Judge's decision not to change venue and impaneling a jury undeniably affected by the intense media attention given to this case truly denied Petitioner a fair and impartial jury, as constitutionally required.

Moreover, the prosecution had no evidence as to how the deaths of Jessie Davis or her unborn fetus occurred. The State's legal theory hinged solely on the abandonment of the Ms. Davis' body, and the actions of Petitioner in the days following her disappearance. Despite the grisly discovery of the body, no evidence was presented to support the theory of any purposeful killing. Additionally, the decision of the prosecution to enhance the potential penalties to include capital murder represented an unwarranted stretch of any prior recognized legal theory. More specifically, the death of an unborn fetus was treated legally as a child under the requisite age of thirteen as the predicate for a capital specification which is unconstitutional. This Court has not decided any case which specifically dealt

with the State's ability to constitutionally elevate the death of an unborn fetus to be a capital specification enhancement for a potential sentence of death.

Moreover, a single act with a single animus cannot be the basis of four (4) potential crimes without sufficient evidence to prove them. The fact that the death of an expectant mother resulted in the death of the unborn fetus cannot be factually distinguished without a separate animus to purposely cause the death of the unborn fetus. Therefore, the charges that the jury were allowed to consider, as well as, the lack of evidentiary support for such findings necessitates appellate review of this case.

Based on principles established by this Court, a trial judge must allow a jury to consider any lesser included offenses to the indicted charge in the event that competent evidence in support of such lesser offense has been offered. It is not within the discretion of the trial court to determine on his own which offense warrants the conviction, if any, but rather provide the appropriate parameters for the jury to consider. When such a determination is made as evidenced by a decision to charge on lesser included offenses, an unconstitutional intrusion into the sole purview of the jury has occurred. Accordingly, further appellate review of the instant case must be made in a forum that will not be unduly influenced by public opinion or sympathetic victims. Moreover, there was undue consideration of the conduct which occurred after the deaths, and such conduct cannot be substituted for the required *mens rea* to support charges of aggravated murder absent independent evidence of the events that occurred prior to death. These issues warrant clarification by this Court.

ARGUMENT NO. I:

THE JURY'S VERDICTS WERE INCONSISTENT SINCE ONE ACT AND A SINGLE ANIMUS RESULTED IN BOTH THE DEATHS OF DAVIS AND THE UNBORN FETUS. THUS, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE DIFFERENT VERDICTS AS A MATTER OF LAW, THUS A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN ENTERED FOR THE PETITIONER.

The factual nature of these specific charges and the single act that caused both deaths mandate a reversal because the jury's findings on the Counts dealing with the death of the mother and the unborn fetus were inconsistent based on the evidence presented.

In this case, the specific nature of the offenses and their requisite elements must be examined. In Count One, the Aggravated Murder of Jessie Davis alleged that Petitioner did purposely cause her death while in the commission of the crime of Aggravated Burglary. In addition to the charge of Aggravated Murder, two capital specifications enhancing the potential penalty for Aggravated Murder to include a death sentence were added. Specification One required the jury to determine if Petitioner purposely caused the death of two (2) or more persons, namely Ms. Davis and her unborn fetus, in the course of conduct. Specification Two mandated a finding that the Aggravated Murder occurred while in the commission of Aggravated Burglary.

The jury was instructed on the lesser offense of Murder and the two crimes were distinguished for the jury as follows:

> The offense of Murder is distinguished from the offenses of Aggravated Murder by the absence or failure to prove that the death was caused while committing or while fleeing immediately after committing the offense of Aggravated Burglary.

Upon consideration, the jury returned a verdict of not guilty as to the crime of Aggravated Murder for the death of Ms. Davis. However, since there was no lesser included charge of involuntary manslaughter to consider, a guilty verdict was returned on the lesser charge of Murder.

In Counts Two and Three, the Aggravated Murder alleged that Petitioner with purpose caused the unlawful termination of Jessie Davis' pregnancy and/or the death of the unborn fetus, while in the commission of an Aggravated Burglary. The same two specifications contained in Count One were also attached. In addition, a third specification requiring the jury to find that the viable unborn fetus of Jessie Davis was a child under the age of thirteen (13) at the time of the Aggravated Murder. The only distinguishing factor therefore involved the identification of a separate victim, who was the unborn fetus. The jury returned a verdict of guilty on both counts and all specifications, including the predicate offense of Aggravated Burglary. It is not disputed that one single act resulted in all of the Murder offenses. There was no testimony or evidence that two (2) separate acts by Petitioner caused the deaths of Jessie

Davis or the unborn fetus. In fact, the coroner confirmed that the death of the unborn fetus resulted solely from the death of the mother. The medical testimony and the undisputed factual circumstances demonstrate that if an Aggravated Burglary occurred, it must have occurred at the same time and place. Accordingly, the jury's verdicts are inconsistent as a matter of law. Simply put, the trial Court abused its discretion in denying the Motion for Mistrial made by the defense after the return of the verdicts, as was noted by the Dissenting Judge from the Stark County Court of Appeals, who was of the opinion that the factual scenario in the instant case was so unique that it seems to warrant an exception to the rule established in ***State v. Conway*, 108 Ohio St. 3d 214, 218 (2006)**, which held that counts of a multiple indictment are not interdependent and that consistency between verdicts on multiple counts of an indictment is unnecessary. See also ***State v. Adams*, 53 Ohio St. 2d 223 (1978)**.

Moreover, a review of the evidence in its entirety, demonstrates that the convictions of Murder, Aggravated Murder and Aggravated Burglary were against both the weight and sufficiency of the evidence. See ***State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997)**; and ***State v. Jenks*, 61 Ohio St. 3d 259 (1991)**. Due to the advanced state of decomposition of the body, the coroner could not determine a cause of death nor rule out any manner of death. Most importantly, no medical testimony supported the theory that Ms. Davis was either strangled or choked, nor was there any opinion offered to support a conclusion of homicidal violence. In fact, the prosecution's reliance on the circumstances surrounding the discovery of the body and its location,

away from the residence, was the sole factor in determining that an act of violence had occurred. Also, this testimony does not support the conviction of Aggravated Burglary.

The Petitioner's acquittal of the higher charge of Aggravated Murder in Count One provides the best proof of the lack of competent and credible evidence necessary to support the conviction of Aggravated Murder of the unborn fetus or the purposeful killing of anyone. These convictions were not supported by evidence of guilt beyond a reasonable doubt. Therefore, the convictions must be reversed.

Further, based upon the actual evidence presented and the failure of the State to present sufficient evidence for the crimes of Aggravated Murder and Aggravated Burglary, the Petitioner claims that he was entitled to a judgment of acquittal as to those charges. As outlined above, the State failed to present any evidence supporting the purposeful killing of either victim. Also, there was no presentation of evidence that showed a connection between the death of Jessie Davis and the death of the unborn fetus, as required to support different conclusions on the respective counts. Absent separate acts or evidence showing independent animus with regard to the unborn fetus, the convictions of Aggravated Murder were without legal foundation as a matter of law. Also, the allegations relating to the commission of an Aggravated Burglary are without merit. It was uncontroverted that Petitioner was a consensual visitor to the home and absent specific evidence of the events that led to her death; there was no factual basis to support a conviction of Aggravated Burglary. The failure to provide evidence of separate acts or

independent animus in the events that resulted in the deaths mandate a reversal of the convictions as a matter of law.

ARGUMENT NO. II:

AN ACCUSED IS ENTITLED TO A CHANGE OF VENUE WHEN IT WAS CLEARLY EVIDENT THAT THE JURY HAD BEEN SO EXPOSED BY PRE-TRIAL PUBLICITY THAT THE JURY HAD DETAILED KNOWLEDGE OF THE CASE.

After receipt and review of the juror questionnaires, and the initial phase of the jury selection process, Petitioner filed a Motion seeking a change of venue due to detailed knowledge of the allegations amongst the vast majority of the venire. After oral hearing on February 1, 2008, the Court determined that the change of venue was not well taken and that the Trial would proceed.

A defendant has a constitutional right to an impartial jury as guaranteed by the Sixth Amendment of the United States Constitution. In addition, the Ohio Constitution guarantees an impartial jury of the county in which the offense is alleged to have been committed. See **United States Constitution, Article 1, §10**. The jury, as it was comprised and the entire venire from which it was selected, had been so infected by the mass influx of media publicity that it could not be salvaged. Accordingly, a change of venue was mandated.

Under the **Ohio Revised Code, §§2901.12(K) and 2931.29 - 2931.31**, the statutory guidelines for the

appropriate procedure for a change of venue are also provided. **Rule 18, Ohio Rules of Criminal Procedure**, also provides guidance. In reviewing the circumstances for a change of venue, courts have found that a variety of factors are relevant in determining whether news coverage is reasonably likely to have prejudiced the case. Factors to be considered include the particular content of the publicity, the dissemination of publicity within the area from which the venire is drawn, the participation by police or the prosecution in the release of publicity, the severity of the offense at issue, and the size of the area from which the venire is drawn. **O. Jur. 3d Criminal Law, Sections 686, 687.**

Application of these factors to this case reveals that there was an overwhelming likelihood of prejudice due to the extensive nature of the coverage which preceded the Trial. Stark County was saturated with media coverage. Alleged reports of confessions being made were denied, the status of the co-defendant Myisha Ferrell and her perceived willingness to testify was also highly publicized and the impact of her plea bargain and its signaling of the guilt of Petitioner had been widespread. In fact, many of the prospective jurors, in completing the questionnaires recited verbatim the alleged nature of the offenses and the statements attributed to the co-defendant following her acceptance of a plea bargain. The coverage of this in its totality demonstrated that Petitioner could not receive a fair and impartial trial in Stark County. In fact, the venire in its entirety showed a detailed knowledge of the case, the facts at issue and an overwhelming leaning toward the opinion that Petitioner must be guilty due to the information being reported by the media. The jury, as seated, included

individuals who personally participated in the search for the body of the victim which created a predilection towards identification with the State's case[1]; several others who believed Petitioner was guilty but who pledged to reserve absolute ruling until hearing of the actual evidence; and the remainder all followed some or all of the coverage of the crime prior to being selected. These admissions on the part of the jury were known prior to opening statements and the introduction of any evidence. With such evidence presented in the form of jury questionnaires and testimony during *voir dire* at the time of its ruling, the trial Court was on notice as to the fundamental issues of fairness that were absent in the venire and despite the extensive prophylactic measures put in place, it was apparent that a truly impartial jury in Stark County could not be seated. See ***Forsythe v. State*, 2 Ohio Misc. 99 (1967 C.P.)**.

While the standard for a change of venue does not require that a jury has absolutely no prior knowledge of a case, it does require that the venire maintain its ability to set aside any prior opinions or viewpoints in sole favor of the evidence.

> The law does not require that in order to be an acceptable juror, that a person have no prior knowledge of an event or even that a person has

---

[1] Defense counsel requested the exclusion of any juror who personally participated in the search for the body or had a family member or close friend that was involved as a matter of cause. These objections by the defense were rejected and overruled by the Trial Court. The ultimate inclusion of a juror on the panel who personally participated in the search is raised in a separate Argument.

> not previously formed or expressed an opinion about what they've seen or heard. The law does require that a juror is able to lay aside such opinion, put the acquired information out of their mind, and listen fairly to all the evidence and be uninfluenced by any previous information or opinions or any pressures in the community and render a fair and unbiased verdict.

***State v. Gabriel*, 170 Ohio App. 3d 393 (2007).** Clearly, this case demanded a change of venue. See ***State v. Gross*, 97 Ohio St. 3d 121 (2002); and *State v. Mundt*, 115 Ohio St. 3d 22 (2007).**

One of this Court's landmark cases, in the area of venue, is ***Sheppard v. Maxwell*, 384 U.S. 333 (1966)**, where this Court found that the massive, pervasive and prejudicial publicity prevented the defendant from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. **(Id., p. 335.)** Identifiable prejudice to the accused need not be shown, if, as in ***Estes v. Texas*, 381 U.S. 532 (1965)**, and even more so in this case, the totality of the circumstances raises the probability of prejudice. **(Id., pp. 542-543.)** The ***Cutts*** case generated so much pretrial publicity that it was one of the most publicized homicide cases in the State of Ohio's history. And, for the trial Court to be unwilling to recognize the significant impact of the media's publicity on the prospective jurors, who had been exposed to intimate facts of the case, is confounding. A fair Trial could not be had in Stark County.

ARGUMENT NO. III:

A JUROR WHO PARTICIPATED IN THE SEARCH OF THE VICTIM SHOULD HAVE BEEN EXCUSED FOR CAUSE AS A MATTER OF LAW, AND THUS PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED.

The trial Court's decision not to excuse jurors who had personally participated in the search of Jessie Davis, was an abuse of discretion. The Petitioner's contention is that the doctrine of presumed or implied bias applies here. A finding of implied bias should be made where "the relationship between prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." See ***Johnson v. Luoma*, 425 F.3d 318, 326 (6th Cir. 2005) (quoting *Person v. Miller*, 854 F. 2d 656, 664 [1988])**. Here, where a juror had participated in the search for Jessie Davis, who had been missing for nine (9) days before her body was found, evidences the strong likelihood of an improper emotional attachment to the victim. So much so, that it was undoubtedly unrealistic to conclude that such a juror would be impartial to both sides.

In ***Smith v. Phillips*, 455 U.S. 209 (1982)**, Justice O'Connor, in her concurrence, acknowledged that the implied bias doctrine is viable only in extreme or exceptional cases. Here, below is the relevant segment of her Opinion describing the potential application of this doctrine:

> [T]hat the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or **somehow involved in the criminal transaction.** ***

Id., p. 222. (*Emphasis supplied.*)

The Petitioner has a right to an impartial jury which is composed of jurors who are indifferent to the case. See ***Irvin v. Dowd*, 366 U.S. 717 (1961).** Having jurors seated in a case where their conduct has illustrated an allegiance to the homicide victim, clearly indicates that such jurors cannot be fair.

The Petitioner repeatedly requested that any potential juror that had participated in the search, or who had a close friend or family member that had been involved, be removed for cause. Such requests were rejected by the trial Court. Under favor of **Rule 24, Ohio Rules of Criminal Procedure**, the trial Court is empowered to excuse prospective jurors for cause. Notwithstanding the obvious concerns here, ultimately, one of the jurors seated on the panel had personally participated in the search. However, having been forced to use all of its peremptory challenges due to the presence of multiple members of the venire with extensive knowledge of the facts, who expressly or implicitly revealed their bias, such a juror was allowed to remain. As a matter or fundamental fairness, the law requires that prospective jurors be free of any prejudice, bias or sympathy towards either party to a case. See ***Gabriel*, supra**. It is difficult to imagine more prejudicial circumstances than in the case *sub judice*. To allow an individual who had

volunteered to participate in a search for a missing person to subsequently sit as a juror in the same trial is a blatant miscarriage of justice and demonstrates an abuse of discretion on the part of the trial Court.

ARGUMENT NO. IV:

WHERE THERE WAS UNCONTROVERTED EVIDENCE PRESENTED BY THE DEFENSE THAT THE DEATHS WERE NOT INTENTIONALLY CAUSED, IT IS A DUE PROCESS VIOLATION WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.

In ***Beck v. Alabama*, 447 U.S. 625 (1980)**, it was held that due process requires that a lesser included offense is required when the evidence warrants such an instruction. The Court further stated, however, that "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. . . ." **Id., p. 636**. Also, quoted in ***Hopper v. Evans*, 456 U.S. 605, 611 (1982)**.

In Ohio, a two-prong test is used to determine whether a jury instruction on a lesser-included offense is warranted. ***State v. Thomas*, 40 Ohio St. 3d 213, 216 (1988)**. First, the offense in the requested instruction must be a lesser included offense of the crime charged. Second, the facts presented must be examined to determine whether the evidence supports a conviction for the lesser offense and not the greater. ***State v. Kidder*, 32 Ohio St. 279 (1987)**. The lesser included instruction of involuntary manslaughter

should have been given, since the evidence supported that lesser included instruction. The trial Judge summarily found that there was no basis to include an involuntary manslaughter instruction for the jury's consideration.

In this case, the sole evidence presented by the State, regarding the circumstances of the death of Jessie Davis, was the testimony of the co-defendant, Myisha Ferrell. She testified that Petitioner told her that "something bad happened" and that she observed both bite and scratch marks on him. (**Tr., pp. 417-419, 428.**) Her testimony supported Petitioner's version of events wherein he testified that he did not intentionally cause Jessie Davis' death, but acknowledged that it did occur in the midst of an altercation. There was no contradictory evidence presented by the State that showed an intent or purpose to commit aggravated murder or murder. Without any evidence contrary to Petitioner's version of events as to the manner of the death of Jessie Davis, the jury should have been allowed to consider the lesser included offense of involuntary manslaughter.

Unlike the facts in ***Hopper***, where the evidence in that case supported the claim that the perpetrator intended to kill the victim, and affirmatively negated any claim that he did not intend to kill the victim. This Court found that ***Hopper*** was not unduly prejudiced by the State Court's failure to provide a lesser included offense instruction. In the instant case, however, there was no other proof as to the manner in which Jessie Davis died other than the testimony provided by the Petitioner. The State failed to present any forensic or medical evidence which contradicted Petitioner's version of events. Wherefore, Petitioner's right to be

provided with a lesser included offense instruction was unlawfully denied.

ARGUMENT NO. V:

AN ALTERNATIVE METHOD OF USING OHIO DRIVER'S LICENSE RECORDS TO EXPAND THE PROSPECTIVE JURY VENIRE SHOULD HAVE BEEN UTILIZED TO ENSURE A JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

The Petitioner sought to expand the prospective jury venire by using Ohio driver's license records of Ohio Bureau of Motor Vehicles as a selection method pursuant to **Ohio Revised Code, §2313.08**. The Petitioner presented evidence as to the racial and ethnic make-up of both the City of Canton and Stark County, as well as other documentation as to the percentage of registered voters. The Petitioner expressed concern in obtaining a representative number of African Americans in the jury selection process. (**Transcript of November 16, 2008, pp. 20-36.**)

Prior to the Motion Hearing, the trial Court had also proceeded with *voir dire* and the impaneling of a jury in the trial of the co-defendant Myisha Ferrell. A review of the proceedings demonstrated that upon the solicitation and screening of potential venire, 136 persons appeared before the Court. Further, of the total number of persons appearing, only three (3) were African American. In fact, the jury, as impaneled, was

entirely white. **(Id., pp. 31-33.)** These results confirmed our legitimate concern, and should have compelled the trial Court to consider other alternative methods to ensure that all sectors of the community were adequately represented. It was apparent, prior to the issuance of any juror summons in this case, that an alternative method was necessary to ensure minority representation and a fair cross-section of the community.

Ohio has enacted special provisions to protect a defendant's Sixth Amendment right to a fair cross-section of the community and a representative venire of his peers. The General Assembly enacted **Ohio Revised Code, §2313.08**, which purpose was to allow the trial Court to supplement the jury venire with licensed drivers, as well as registered voters. The exclusion of ethnic minorities is not the only consequence of the use of voter registration for jury pools. In a capital trial, assuming guilt can be established, the jury would decide whether the defendant should live or die. See **Ohio Revised Code, §2929.03**. The decision to grant life or death to a defendant is based upon the establishment of various mitigating factors, including the background and personal characteristics of the accused. ***Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)**.

In an effort to meet these concerns regarding the exclusion of minority groups from the venire and meet the Sixth Amendment's promise of a fair cross-section requirement, the use of drivers' license registrations, as outlined in **Ohio Revised Code, §2313.08**, should have been utilized if any doubts as to the fairness of the venire were present.

The trial Court declined to supplement the venire through use of drivers' license records in an effort to increase the diversity of the jury venire. Since the trial Court was in a unique position to observe the actual numbers of the available venire responding to jury summons in its jurisdiction and was therefore cognizant of the dearth of minority representation, it was arbitrary and unreasonable not to consider other means recognized by the Ohio law to ensure a fundamentally fair and diverse jury pool. At the commencement of the jury selection of Petitioner's trial, in excess of 450 people were brought to Court for some type of *voir dire* process. Of the total pool of people who were presented, approximately twenty (20) people were of African American descent. Further, the jury, as impaneled did not contain a single African American. Accordingly, the concerns raised by Petitioner prior to trial were in fact realized at the trial and demonstrated an unduly prejudicial effect in denying the motion seeking to reduce the bias in the venire by expansion of the pool pursuant to **Revised of Ohio, §2313.08**.

ARGUMENT NO. VI:

A REQUEST FOR GRAND JURY TESTIMONY SHOULD BE GRANTED WHEN THERE IS A PARTICULARIZED NEED DEMONSTRATED BY THE PETITIONER, AND A DENIAL OF SUCH IS A VIOLATION OF DUE PROCESS.

The Petitioner moved the Court for an Order to transcribe the Grand Jury testimony prior to Trial, which was duly denied. The Petitioner reserved the right to renew this Motion prior to Trial, which was

again denied. (**Transcript of November 16, 2008, pp. 9-19.**) As discovery progressed, Petitioner requested the Grand Jury testimony of certain witnesses: Courtenay Robinson, Adrena Snell, Agent Wiseburn and the various FBI agents whose names appeared on the State's witness list. Petitioner's request was grounded in principles of ***State v. Greer*, 66 Ohio St. 2d 139 (1981)**, in holding that "from a consideration of all the surrounding circumstances, it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witnesses." (**Id., p. 139.**) A particularized need existed for two (2) reasons: (1) the State's case was premised upon allegations of oral admissions made to witnesses and/or to the co-defendant Myisha Ferrell, which were not provided pursuant to **Rule 16, Ohio Rules of Criminal Procedure**; and (2) the death specification contained in the Indictment was based upon allegations of a burglary for which no evidence was produced but merely a legal theory. Accordingly, absent disclosure of the Grand Jury testimony, the ability for full cross-examination of any inconsistencies at trial was necessary to ensure a full and fair trial.

At Trial, the State's witness Richard Mitchell, who was a longtime acquaintance of Petitioner and who had been with Petitioner on the evening prior to the alleged murder, testified as to his own whereabouts on June 14, 2007, and his presence with Petitioner's family during the time of the investigation. However, at Trial, the State elicited testimony from this witness, wherein he testified that Petitioner had made an earlier threat "to kill [Davis] and throw her in the woods," a month prior to her disappearance. (**Tr., p. 786.**)

During the examination of the witness, defense counsel objected to the introduction of any alleged statements or comments attributed to Petitioner on the basis that no notice or discovery had been provided pursuant to **Criminal Rule 16**. The prosecution acknowledged that the witness had testified to the threat made by Petitioner at the Grand Jury but that it had not been provided since the statement was not made to law enforcement. The nature of the threat and its similarity to the murder mandated its disclosure. The discovery of such explosive testimony during the Trial was tantamount to a trial by ambush and provides the best evidence of the harm and prejudice which resulted from the trial Court's refusal to transcribe the Grand Jury proceedings as requested. (**Tr., pp. 778-780.**)

Further, the State's case was premised solely upon oral admissions allegedly made by Petitioner. Clearly, such alleged admissions were discoverable under **Criminal Rule 16** and were not provided. Petitioner's assertion of a particularized need and the request for an *in camera* inspection at the very least should have been afforded.

Ohio law mandates that although Grand Jury proceedings are secret, a defendant is entitled to disclosure if the ends of justice require it. ***Greer*, supra**. Further, this practice at the federal level of broadening the disclosure of Grand Jury proceedings in accordance with ***Jencks v. United States*, 353 U.S. 657 (1957)**, should have been followed by the trial Court in this case.

Grand Jury proceedings and **Rule 16(B)(1)(g), Ohio Rules of Criminal Procedure**, do not emanate

directly from clear constitutional provisions, nevertheless "when a State opts to act in a field where its action has a significant discretionary element, it must, nonetheless, act in accord with the dictates of the Constitution, and in particular, in accord with the Due Process Clause." ***Evitts v. Lacey*, 469 U.S. 3877, 401 (1985)**.

Further, since this case contained a capital death specification, the pre-trial transcription of the Grand Jury proceedings was mandated by defendant's Ohio and United States Constitutional rights to a fair trial, effective assistance of counsel, confrontation of witnesses, presumption of innocence, and freedom from cruel and unusual punishment. **(U.S. Constitution Amendments V, VI, VIII, IX and XIV; Ohio Constitution, Article 1, §§1, 2, 5, 9, 10, 16 and 20.)** Death is different, for that reason more process is due, not less. ***Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976)**. Accordingly, the failure to disclose Grand Jury testimony presents an error by the trial Court.

ARGUMENT NO. VII:

THE ADMISSION OF OUT-OF-COURT HEARSAY STATEMENTS PURPORTEDLY MADE BY A TWO (2) YEAR OLD CHILD VIOLATED THE PETITIONER'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT.

The State filed a Motion to determine admissibility of evidence and noticed its intention to introduce alleged statements made by Petitioner's two (2) year old son, Blake, to Detective Wiseburn during his

investigation. The Petitioner objected and moved the Court to exclude the statements as hearsay. At the motion hearing, the State attempted to lay a foundation for the admission by asserting that the statements qualify as excited utterances and as statements of the child's existing mental, emotional, or physical condition. The trial Court ruled that the statements were excited utterances and admissible. The Court further found that the interrogation by law enforcement was part of an ongoing emergency. (**Transcript of February 1, 2008, pp. 78-80**.) This ruling was contrary to law and represented an abuse of discretion by the trial Court.

A close inspection of the statements illustrates that these exceptions did not allow for admission of the evidence at Trial. The State failed to demonstrate that the statements were made while the child was still under the stress or excitement of any event or condition since the circumstances relate to conduct that had allegedly occurred more than twenty-four (24) hours earlier. Simply put, the statement did not fall under any of the recognized exceptions to the hearsay rule and were improperly admitted at trial.

Similarly, the State's offering of the statements to explain the actions of the law enforcement personnel in conducting a missing person search do not justify their introduction and inherent unreliability as hearsay testimony. In fact, the overall actions of law enforcement from the moment of arrival on scene demonstrated that a criminal investigation was underway.

In addition to the statements representing unreliable hearsay testimony, the evidence was

admitted in violation of Petitioner's Sixth Amendment right of confrontation and the express mandate of ***Crawford v. Washington*, 541 U.S. 36 (2004)**. The State could not provide a factual basis to support its contention that the statements were made in the course of an ongoing emergency. In fact, as in the Supreme Court's rejection of the statements made by a child declarant in ***Siler v. Ohio*, 543 U.S. 1019 (2004)**, the passage of time since the alleged event or trauma must be considered prior to any introduction at trial as an excited utterance. Moreover, the lack of immediate emergency and the overall evidence showing that the child had been alone for some time period provided the basis for the interrogation of the police as an investigation into a past crime or event. Therefore, any use of the statements must be filtered through the lens of the confrontation clause and the qualification of the child declarant himself. As addressed by the Ohio Supreme Court in its reconsideration of the ***Siler*** case, the sole issue for resolution is to determine the primary purpose of the interrogation. As held by the Court, statements obtained through interrogation by law enforcement personnel or their agents must afford Petitioner the right of confrontation as guaranteed by the Sixth Amendment, as they are deemed testimonial and for the purpose of criminal investigation and potential prosecution. Therefore, any statements made to law enforcement personnel and/or as a result of their questioning, must be barred.

Finally, the State introduced similar statements allegedly made by the child to his grandmother, which were hearsay and not subject to any exception as set forth in the Ohio Rules of Evidence. As explained by the United States Supreme Court in ***Davis v.***

Washington*, 547 U.S. 813 (2006)**, and reiterated in ***Siler v. Ohio*, supra**, "there was no emergency in progress; the interrogating officer testified that he heard no arguments or crashing and saw no one throw or break anything *** and there was no immediate threat to her person. Thus, objectively viewed, the primary, if not sole purpose of the interrogation was to investigate a possible crime." **(Id., p. 829.)** A review of the circumstances leading up to the questioning of Petitioner's son reveals that they are similar if not identical. In the instant case, there was no ongoing emergency in progress. Sergeant Wiseburn was investigating a possible crime. With this being so, the admission of these statements into evidence was legally inappropriate.

ARGUMENT NO. VIII:

THE STATE'S UNRESTRICTED USE OF CHARACTER EVIDENCE THAT WAS IRRELEVANT AND INFLAMMATORY, DENIED THE PETITIONER'S RIGHT TO A FAIR TRIAL.

The Petitioner moved the Court to exclude any testimony involving his romantic relationships with other women, after having been noticed by the State's intention to call multiple witnesses for the sole purpose of impeaching his character. Specifically, Petitioner sought to exclude the testimony of Jill Butler, Stephanie Hawthorne and Jennifer Sprout whose testimony was being offered by the State to show a pattern of extra-marital affairs with other women. This testimony was unduly prejudicial and without any relevancy to the crimes charged.

Also, Petitioner sought to exclude specific testimony involving the pregnancy of Stephanie Hawthorne and her personal decision to terminate it. Such disclosures by Ms. Hawthorne, made reluctantly to the police, were in no way related to the murder charges, and did not contain any admission made by Petitioner. Further, such testimony was extremely personal and highly prejudicial due to the divergent views among the community at large as to a woman's right to choose. Accordingly, Petitioner sought to exclude such testimony for its lack of relevancy as to the issues at trial and its overall minimal value. (**Transcript of February 1, 2008, pp. 104-119.**)

Rule 403(A), Ohio Rules of Evidence, provides for a mandatory exclusion of any evidence that, although relevant, has probative value that is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. In this case, the State was allowed to introduce testimony of multiple witnesses for the sole purpose of discrediting Petitioner without providing any relevance or basis for establishing a causal link to the facts at issue.

Although evidence may be admitted for the purpose of impeaching Petitioner's credibility, it must still be related to the relevant issues and factual questions. Further, testimony must not be duplicative and cannot be admitted in the event that other relevant evidence is available for use by the State. Assuming that the testimony was relevant, the probative value must be sufficient to outweigh the likelihood of prejudice and undue harm to be admitted.

It was incumbent upon the trial Court to safeguard the trial and the constitutional rights of Petitioner without restricting the State's ability to introduce relevant evidence as to the crimes allegedly committed. Accordingly, by allowing the admission of this type of evidence was an abuse of discretion and denied Petitioner a fundamental fair trial.

ARGUMENT NO. IX:

IT IS A VIOLATION OF DUE PROCESS WHEN A TRIAL COURT IMPOSES MAXIMUM AND CONSECUTIVE SENTENCES WHEN THE CONVICTIONS ARE ALLIED OFFENSES AND SHOULD BE MERGED FOR SENTENCING PURPOSES.

The Petitioner claims that the imposition of a maximum and consecutive sentence was contrary to law and not supported by the facts. It is undisputed that the convictions of Murder, Aggravated Murder and Aggravated Burglary all arose from one singular act and the consecutive sentences are thus improper and should have merged as allied offenses. See **Ohio Revised Code, §2941.25**.

In determining whether offenses are allied or of similar import, the Court must decide if the crimes were committed separately or with separate animus. See ***State v. Rance*, 85 Ohio St. 3d 632 (1999)**; ***State v. Jones*, 78 Ohio St. 3d 12 (1997)**; and ***State v. Blankenship*, 38 Ohio St. 3d 116 (1988)**. To support the charge of Aggravated Murder, the Aggravated Burglary was a necessary element. In addition, the commission of the Aggravated Burglary did not occur

until the moment of the homicide since the crime required a legal finding of the revocation of privilege. Accordingly, the predicate offense must be deemed allied and merged. Thus, the trial Court disregarded the plain requirements of **Ohio Revised Code, §2941.25** and sentenced contrary to law.

The Ohio Supreme Court's recent decision of ***State v. Cabrales*, 118 Ohio St. 3d 54 (2008)** further illustrates the necessity of considering the single animus of the predicate offense in determining if offenses are allied.

ARGUMENT NO. X:

THE TRIAL COURT'S FAILURE TO DISMISS THE CAPITAL SPECIFICATIONS TO THE INDICTMENT WAS A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS.

The Petitioner challenged the sufficiency of the Indictment and asserts that the charges and specifications filed against him had no foundation in law or fact. Specifically, Petitioner challenged the legal basis for the capital specification which alleges that he caused the death of two or more persons in the course of conduct, namely the death of a child under the age of 13. Accordingly, Petitioner sought a dismissal of the capital specification.

Under **Ohio Revised Code, §2901**, the definitions and legal meanings as to the terms set forth in the criminal statutes are established. Any term that is defined is given the meaning so established unless and until such definition is altered or refined by case law.

Accordingly, a capital specification that established the death of a person under the age of 13 as an aggravating circumstance that would elevate the penalties for murder must be viewed under the basic definitions of §2901 which provide that a person is defined as a human life which is already in existence and capable of sustaining life. A closer inspection of the definitions of §2901 demonstrates the distinction between an unborn fetus and a person, and the legal meaning to be afforded such terms. Accordingly, any indictment which alleges unlawful conduct in violation of **Ohio Revised Code, Chapter 29** must have comported with the definitions set forth therein absent specific legal authority to the contrary.

In this case, the State alleged in its Indictment that Petitioner caused the death of Jessie Davis and her unborn fetus in three (3) Counts of Aggravated Murder. The Indictment set forth a specification which alleged the death of two or more persons in the course of his conduct and attempted to establish the death of the unborn fetus as a person as defined therein. Such Indictment and specification is not supported by the definitions of **Ohio Revised Code, §2901** and has no legal justification or support by any established or reported case law in Ohio. While the termination of another's pregnancy can be asserted as a charge for murder under **Ohio Revised Code, §2903,** it could not serve as an aggravating circumstance for the purpose of enhancing the penalties from life in prison to death.

Further, the allegations relative to the offense of Aggravated Burglary were not supported by any evidence nor did they arise out of any independent act. As outlined in the instructions of law provided to the

jury, the offense of Aggravated Burglary was premised upon the theory that at the time of the commission of the murder of Jessie Davis, any privilege to enter the premises was revoked as a matter of law. Absent independent actions or circumstances which demonstrate the requisite *mens rea* of Petitioner at the time of the alleged murder, the single act of her death is insufficient to give rise to the multiple charges of Aggravated Murder and Aggravated Burglary.

Further, the State provided no information which related to separate actions or animus on the part of Petitioner in causing the death of the fetus which was required by law. Absent evidence of particularized conduct allegedly committed by Petitioner, the charges and specifications related thereto should have been dismissed as facially defective.

CONCLUSION

Based on the above arguments, Petitioner was denied a fair trial as guaranteed by the United States Constitution. Therefore, we are requesting that the convictions of Petitioner are reversed and remanded for a new trial.

Respectfully submitted,

FERNANDO MACK, ESQ.
Reg. No. 0062937
MYRON WATSON, ESQ.
Reg. No. 0058583
420 Lakeside Place
323 West Lakeside Avenue
Cleveland, Ohio 44113
(216) 556-9610
(216) 575-7664 (Fax)
Attorneys for Petitioner

APPENDIX

APPENDIX
TABLE OF CONTENTS

Appendix "A" -Opinion of the Ohio Court of Appeals, Fifth Judicial District, date of journalization July 22, 2009 ..... 1a

Appendix "B" - Entry of The Supreme Court of Ohio, denying further Appellant review filed December 2, 2009 ..... 101a

APPENDIX A

[Cite as *State v. Cutts*, 2009-Ohio-3563.]

COURT OF APPEALS STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. 2008CA00079

[Dated July 22, 2009]

STATE OF OHIO	)
	)
Plaintiff-Appellee	)
	)
-vs-	)
	)
BOBBY LEE CUTTS, JR.	)
	)
Defendant-Appellant	)
	)

OPINION

JUDGES: Hon. William B. Hoffman, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J.

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2007- CR-1098(A)

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 22, 2009

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO
PROSECUTING ATTORNEY
RONALD MARK CALDWELL
KATHLEEN O. TATARSKY
ASSISTANT PROSECUTORS
110 Central Plaza South, Suite 510
Canton, Ohio 44702-1413

For Defendant-Appellant

CAROLYN KAYE RANKE
MYRON P. WATSON
FERNANDO MACK
420 Lakeside Place
323 West Lakeside Avenue
Cleveland, Ohio 44113

Wise, J.

{¶1} On August 23, 2007, the Stark County Grand Jury indicted Appellant, Bobby Lee Cutts, Jr., on seven counts involving the homicide of Jessie Marie Davis and her unborn child. The Indictment charged Appellant with one count of aggravated murder in the death of Davis, in violation of R.C. §2903.01(B), carrying two death penalty specifications ("Count One"); one count of aggravated murder for the unlawful termination of Jessie's pregnancy, in

violation of R.C. §2903.01(B), carrying three death penalty specifications ("Count Two"); one count of aggravated murder of a viable, unborn child, in violation of R.C. §2903.01(C), with three death penalty specifications ("Count Three"); one count of aggravated burglary, in violation of R.C. §2911.11(A)(1) ("Count Four"); two counts of gross abuse of a corpse, in violation of R.C. §2927.01(B) ("Counts Five and Six"); and one count of child endangering, in violation of R.C. §2919.22(A) ("Count Seven"). Appellant appeared before the trial court on August 24, 2007, and entered a plea of not guilty to the Indictment.

{¶2} Prior to jury selection, the trial court granted Appellant's motion for special procedures to insulate the venire and the impaneled jury. Prospective jurors were mailed a petit juror summons, a cover letter, and a general questionnaire. The State and Appellant approved the content and mailing of these items. Potential jurors appeared on January 15, 16, and 17, 2008, to complete death penalty and pre-publicity questionnaires. Approximately two weeks later, the prospective jurors returned to court for a hearing regarding the answered questionnaires. The trial court ordered all general questionnaires, as well as the death penalty and pre-publicity questionnaires, to be sealed.

{¶3} On February 4, 2008, the matter proceeded to jury trial.

{¶4} During her testimony, Patricia Porter, Jessie Davis's mother, testified that on June 13, 2007, Jessie dropped off her son, Blake, at Porter's home. She stated that her other daughter, Audrey Davis, would watch Blake until Porter returned from work. Porter

was not present later that day when Jessie picked up Blake, but spoke with her daughter at approximately 9:00 p.m., during which time Jessie told Porter that Appellant would be picking Blake up that evening and that Blake would be with him the following day, June 14, 2007. Porter testified that she and Audrey made attempts to contact Jessie on her cell phone on June 14, 2007, but her phone went directly to voicemail. Porter said she made an additional attempt to contact Jessie later that evening but was unsuccessful. Porter assumed Jessie was asleep and that she would talk to her in the morning.

{¶5} Porter stated that she again tried to contact Jessie at approximately 6:00 a.m. the next day, June 15, 2007, but did not get an answer. When Jessie did not show up to drop off Blake at Porter's house at their usual time of 7:00 a.m., Porter and Audrey went to Jessie's residence. Porter entered Jessie's residence through the back sliding glass door which she had found unlocked. She stated that she entered the kitchen and began calling for Jessie. She testified that as she walked in, she saw the contents of Jessie's purse dumped onto the floor. Blake ran into the kitchen in a wet and soiled diaper. Porter recalled that she actually smelled the child before she saw him. Porter stated that she asked Blake where his mother was, to which he responded, "Mommy is crying. Mommy broke the table. Mommy is in the rug." Porter stated that she ran upstairs, calling for Jessie. Once inside Jessie's bedroom, Porter found the mattress knocked partially off the bed, a table and lamp knocked over, and bleached patches on the floor. Porter also noticed the burgundy and gold comforter from Jessie's bed was missing. Porter ran frantically throughout the house searching for Jessie. When she

did not find her daughter, Porter called 911. Porter recalled that she then told Audrey to telephone Appellant. A neighbor, who had heard Porter's screams, arrived and assisted with Blake. Police arrived at the scene, as did Appellant.

{¶6} Porter testified that Appellant telephoned her the following day, asking to speak with Blake, but Blake did not want to speak to him. Porter said she asked Appellant if he had done anything to Jessie, and that he responded with a "No". Porter said that she told Appellant she would support him until she had reason not to do so. Porter stated that Appellant then asked if Blake had seen "everything", and Porter replied, "Yes, I believe he did." (Feb. 4, 2008, T. at 96).

{¶7} Darin Baad, a deputy sheriff with the Stark County Sheriff's Office, testified that he was working the day shift on June 15, 2007, when he volunteered to respond to a call regarding a missing person and a possible burglary. Baad was the first officer to arrive at the scene. Baad stated that he spoke with Porter, who explained why she had called the police. The deputy entered the residence and proceeded upstairs to Jessie's bedroom. Inside the bedroom, Baad stated that he found the mattress shifted off the box spring, a lamp and a table knocked over, a bottle of bleach, and a large stain on the rug. The deputy testified that he continued through the rest of the house, noticing a purse on the floor of the kitchen. While Baad was in the basement, Appellant entered the residence. Baad questioned Appellant as to his reason for being at Jessie's home. Appellant informed the deputy that he and Jessie had a child together and that he had been called by either Porter or Audrey. Together with Appellant, Baad inspected the garage and the trunk of

Jessie's car. Baad then exited the residence. At that point, a number of other law enforcement officers had arrived and Baad shared the information he had obtained with them. The deputy testified that local hospitals had been contacted, but the hospitals had no information regarding Davis or any Jane Does. Deputy Baad stated that he examined Blake to determine if he needed any medical assistance, as he was concerned the child may have ingested the bleach. Although the deputy and other officers spoke with neighbors, they were unable to gather any additional information as to Jessie's whereabouts.

{¶8} Sergeant Eric Weisburn with the Stark County Sheriff's Office testified that he was the shift supervisor on June 15, 2007. Although he was on his way to court when he heard the initial dispatch, he decided to respond to the scene as the call suggested something out of the ordinary had occurred. En route, he contacted the dispatcher with instructions for any officer or deputy at the scene to clear the house. Sergeant Weisburn stated that upon arriving at the Davis residence, he conferred with the other officers and learned about Appellant's connection to Davis. Sergeant Weisburn stated upon reviewing the scene, he observed the purse spilled on the kitchen floor and the state of disarray in the bedroom. Sergeant Weisburn spoke with Appellant to ascertain any information he may have had about Jessie's whereabouts. While speaking with Appellant, Sergeant Weisburn observed that Appellant had a band-aid on the pinky finger of his left hand. Appellant stated that he had cut himself while cleaning out a patio fireplace.

{¶9} After speaking with Appellant, Weisburn proceeded to speak with Blake. The sergeant asked the

child if he knew where his mother was, to which Blake replied, "Mommy is at work." After some time, Blake stated, "Mommy is crying. Mommy is in the rug. Mommy broke the table." Sergeant Weisburn testified that these last statements were not given as answers to any questions he had posed to Blake, and that Blake repeated the statements several times. Blake also stated, "Daddy's mad." Sergeant Weisburn asked the child why his daddy was mad, but Blake just continued to repeat "Daddy's mad." Sergeant Weisburn stated that he then proceeded to collect and read Porter and Audrey's written statements and that prior to leaving the scene, he asked Appellant to return to the sheriff's office with him for further questioning. Weisburn stated that he wished to speak with Appellant in hopes of creating a better timeline of events.

{¶10} Appellant arrived at the sheriff's department at approximately 1:00 p.m. that day. Sgt. Weisburn stated that Appellant told him about the attempts he had made to reach Davis on her cell phone. He also informed the sergeant that the previous day, June 14, 2007, he picked up his friend, Myisha Ferrell, to babysit Blake, while he was at football practice. Appellant continued to deny any knowledge of Jessie's whereabouts. Following the interview at the sheriff's department, Sergeant Weisburn followed Appellant to his home. Appellant allowed the sergeant to inspect his home, including a shed and water well.

{¶11} Later that day, Sergeant Weisburn and Captain Shankle began to follow up with those individuals whose names Appellant had provided to them. Sergeant Weisburn stated that he spoke with Kelly Cutts, Appellant's wife, who verified the timeline

Appellant had given to him. The officers were also able to verify Kelly Cutts' whereabouts during the same timeframe.

{¶12} The following day, June 16, 2007, Sergeant Weisburn contacted Myisha Ferrell to set up an interview. When the sergeant arrived at her home for said interview, he was informed that Ferrell had company and that he needed to return in thirty minutes to meet with her. Sergeant Weisburn stated that he returned to Ferrell's residence, but no one responded to his knock on the door. He attempted to call the residence, but did not get a response. Sometime later, a third attempt was made to speak with Ferrell; however, that attempt was also unsuccessful. Sgt. Weisburn contacted Appellant, who informed him that Ferrell was at his home and he was welcome to come there and speak with her. Sgt. Weisburn stated that he declined this offer and made arrangements to meet Ferrell later that evening. Larry Davidson, Appellant's cousin, drove Ferrell from Appellant's residence to her house. Davidson remained at Ferrell's house while Sergeant Weisburn spoke with her. Ferrell corroborated Appellant's version of the events.

{¶13} On June 18, 2007, the FBI contacted the Stark County Sheriff's Department and offered their services. The FBI and the Sheriff's Department worked together on any and all leads regarding Jessie's disappearance. The investigation team collected DNA samples from Jessie's family, Appellant, and Ferrell. During the week following Jessie's disappearance, the investigative team uncovered information which conflicted with the information provided by Appellant. Appellant had told Sergeant W

eisburn he left Champs Bar on the evening of June 13, 2007, and went directly home. However, it was subsequently discovered that Appellant visited Stephanie Hawthorne after he left the bar. Appellant had failed to mention Hawthorne during his previous conversations with law enforcement officials. Law enforcement officials also learned that the telephone call Appellant made to Jessie's cell phone at approximately 7:15 a.m. on June 14, 2007, was made from a location in Summit County, not from Appellant's residence as he had informed them.

{¶14} During the following week, Appellant pretended to assist in the search for Davis. However, on June 23, 2007, Appellant and Attorney Brad Iams, who was representing Appellant at the time, arrived at FBI offices and informed the investigation team that he would take them to the location of Jessie's body. After driving approximately two hours, Appellant was able to navigate the investigators to an area in the Hampton Hills Park in Summit County, Ohio. It was there that the investigators found Jessie's body located forty or fifty feet down an embankment. Thereafter, Appellant was placed under arrest.

{¶15} Myisha Ferrell, a friend of Appellant since middle school, testified that on the evening of June 13, 2007, she and three girlfriends went to bingo, to the home of the father of one of her friends, and to a sports bar, before returning to her home. When the women returned to Ferrell's residence, they stayed up all night, playing cards, drinking beer, and smoking marijuana. She stated that sometime after 6:00 a.m., on the morning of June 14, 2007, Appellant arrived at her home, which she found unusual because Appellant always telephoned first before coming over. She

testified that Appellant told her that he needed to talk to her and that he needed some help. Ferrell stated that she could tell something was wrong with Appellant and described his appearance as "dysfunctional", explaining that he just didn't look right. Ferrell noted that she had never seen Appellant look that way. She stated that she walked with Appellant to his truck, which was parked in an alley near her house. Ferrell acknowledged that she was high on marijuana, but understood what was happening. She stated that she got in the truck with Appellant and they proceeded to Interstate 77, where Appellant began to head north.

{¶16} Ferrell stated that as they drove, Appellant told her something was wrong and something bad had happened. Ferrell described Appellant as "nervous looking." Ferrell stated that she did not question Appellant but that after a period of silence, he went on to state that something was wrong with "the baby's mother." Ferrell knew Appellant was referring to his son Blake's mother. She testified that Appellant eventually informed her that Davis's body was in the back of his pick-up truck. Ferrell stated that she asked Appellant what had happened and that he responded with a gesture, raising his arm around his neck. Ferrell asked Appellant about Blake, and Appellant stated that Blake was at the house. Ferrell testified that she thought Appellant meant his house. She said that Appellant made a brief stop at a truck stop in order for Ferrell to use the restroom and that Appellant remained outside of the truck while he waited for her to return.

{¶17} She stated that once they were again on the road, they passed a sign which read "Cuyahoga Falls

Parks," at which time Appellant stopped his truck in an open field. Both Appellant and Ferrell exited the vehicle. In the bed of the truck, Ferrell observed a pair of feet. When asked by the prosecutor if there was anything preventing her from seeing more, Ferrell responded that she did not see and she "didn't want to see nothing else." Ferrell also stated that she noticed white trash bags in the bed of the truck, and that she could see a burgundy print through the bag. Ferrell then watched as Appellant removed Jessie's body from the truck and walked away. Appellant returned to his truck and the pair traveled back to Canton.

{¶18} Ferrell testified that during the return drive, Appellant stopped and deposited the trash bags into a dumpster. She stated that Appellant also stopped a second time at a gas station, washed his truck, and purchased bags of mulch which he placed in the bed of the truck. She recalled that Appellant also placed a call to Jessie's cell phone and left a message asking her why she had never dropped off Blake. Ferrell stated that Appellant then handed her a pink cell phone, which she knew did not belong to him, and Ferrell threw it out the window of the truck. She also recalled that Appellant placed another telephone call to an individual with whom he coached to tell him that he would be late for practice. She said that the two of them then proceeded to Appellant's house, where Appellant took a shower and dressed in wind pants and a t-shirt. Ferrell testified that Appellant asked her if she could see any marks on his chest, but stated that what she saw looked "vague." Ferrell recalled that Appellant had an injury on his pinky finger. When she asked him what had happened, Appellant told her "she" bit him. Ferrell stated that she knew he was referring to Davis. She stated that Appellant then gave

her $100.00, and told her that he wished he could give her more. Ferrell testified that she remained at Appellant's residence while he went to football practice. She stated that Appellant and his daughter returned to his house at approximately 1:00 p.m., and then he drove Ferrell home.

{¶19} Ferrell testified that the following day Appellant telephoned her and informed her that his baby's mom was missing. Ferrell stated that she thought Appellant was crazy. She stated that Larry Davidson arrived at her house sometime later that day and drove her to Appellant's house. She stated that Appellant instructed her to tell the police she was going to babysit Blake, but that Davis never dropped off the child. After Davidson drove Ferrell back to her house, someone from the sheriff's department arrived to speak with her. She stated that Davidson waited in her living room while she spoke with the sheriff's department in another room. Ferrell stated that afterwards, she returned to Appellant's house and remained there until she needed to leave to go to work on the midnight shift at a Denny's Restaurant. Ferrell was arrested on June 24, 2007.

{¶20} The jury also heard testimony from Larry Davidson, Appellant's cousin. He recalled that he was at Appellant's house on June 16, 2007, during which time Appellant told him that Ferrell wanted to come over and asked Davidson to pick her up. A couple of friends were at Ferrell's house when Davidson arrived. After the friends departed, Davidson and Ferrell waited approximately half an hour for the sheriff's deputies. However, the deputies did not show up, so Davidson drove Ferrell to Appellant's house. At Appellant's house, Davidson, Ferrell, Appellant and

his mother sat in the kitchen talking. Davidson and Ferrell stayed at Appellant's house for thirty to forty-five minutes and then returned to Ferrell's house in order for her to speak with the deputies. Davidson remained at Ferrell's house while she spoke with the deputies. Thereafter, Davidson and Ferrell returned to Appellant's house. Davidson drove Ferrell to work later that evening.

{¶21} The State presented a number of other witnesses whose testimony created a timeline for Appellant's whereabouts between 6:00 p.m. on Wednesday, June 13, 2007, and 2:00 a.m. on Thursday, June 14, 2007. On Wednesday evening, Appellant played softball. The game started between 6:00 p.m. and 6:30 p.m. Following the game, he spoke with some friends and then proceeded to Champs Bar, arriving at approximately 8:15 p.m. to 8:30 p.m. Appellant had a couple of beers and socialized with friends, including Denise Haidet, with whom Appellant had previously had an affair. He exited the bar sometime around 12:30 a.m. At approximately 1:00 a.m., Appellant arrived at the home of Stephanie Hawthorne, another girlfriend. Appellant stayed with Hawthorne until 2:00 a.m. Hawthorne called Appellant's cell phone at 2:14 a.m. and spoke with him briefly.

{¶22} Kelly Schaub, fka Kelly Cutts, testified she and Appellant were married on July 28, 2001, and had one child, who was six at the time of trial. Schaub and Cutts separated for a period of approximately nine months between November or December, 2003, and September, 2004. Prior to reconciling in September, 2004, Appellant informed Schaub he had had a one-night stand and, as a result, the woman had become pregnant with his child. Schaub testified Cutts

became obligated to pay child support, which she assumed to be approximately $240.00 every two weeks. The couple separated again in June or July, 2005, until October, 2005. Schaub moved out of the couples' residence permanently in February, 2007. Their divorce was final on December 31, 2007.

{¶23} Schaub recalled that Appellant telephoned her after his softball game on June 13, 2007. Appellant told Schaub that he was at Champs Bar having a drink. During the conversation, Appellant talked about their relationship, stating he had always wanted the relationship to work. Appellant also told Schaub he wished they could get back together. She further recalled that during a conversation on June 14, 2007, Appellant told her that Jessie was supposed to drop off Blake that morning, but that he had to have Ferrell watch the child because he forgot he had a football practice meeting that day. During her testimony, Schaub acknowledged she knew about Appellant's relationship with Davis. She testified that she learned Davis had become pregnant again in November, 2006, and had found out because Davis told her.

{¶24} On cross-examination, Schaub stated that she continued to have concerns about Appellant's relationship with Davis after the couple had reconciled. Schaub detailed an incident which occurred in November, 2005, recalling that as she was getting ready for work, she opened her makeup drawer and found a pair of underwear which did not belong to her. Schaub later learned from Davis that the underwear belonged to her. Schaub told Appellant about the conversation she had with Davis and stated that she did not believe Appellant's response to Davis with regard to the incident was forceful enough. Schaub

says that shortly thereafter, she received a phone call from Davis and that during the call she told Davis that she and Appellant were happily married, and they were all living together with their daughter in their house. Schaub also recalled other telephone calls, initiated by Davis, during which Schaub repeatedly told Davis that she and Appellant were together and living as a family with their daughter. Schaub says that she told both Appellant and Davis numerous times that Davis was not allowed in the home when she dropped off Blake. During the summer of 2006, Schaub said that she received another phone call from Davis telling her that she and Appellant had engaged in sexual relations on Schaub's new patio furniture. Schaub testified that she confronted Appellant about her conversations with Davis but that he simply shrugged off the incidents.

{¶25} Richard Mitchell, a close friend of Appellant, testified that approximately one month prior to the disappearance of Davis, Appellant told him he was "going to kill that bitch and throw her in the woods." Mitchell stated he did not think Appellant was serious when he made the statement. Mitchell could not recall the context in which the statement was made.

{¶26} Craig Polifrone, Jessie's obstetrician/gynecologist, testified that he examined Davis on June 4, 2007, and that she was thirty-five weeks, and six days along in her pregnancy at that time. He stated that he saw Davis again on June 11, 2007, and that there were no complications with the baby and all testing done showed normal results. Dr. Polifrone testified that at that stage in the pregnancy, the baby would have been viable if Davis had delivered it one or two days after he saw her. The doctor added the

chance of a baby dying at that gestational age was extremely low.

{¶27} Dr. Lisa Kohler, the chief medical examiner for Summit County, testified that she was present at the Hampton Hills Metropark on June 23, 2007. She testified that photographs were taken, and the location and condition of the body were documented. She stated that Jessie's body and the comforter, in which she was wrapped, along with a number of small bones and fingernails found on the ground underneath where the body had been positioned, were placed inside a body bag for transport to the coroner's office.

{¶28} Dr. Kohler testified that she performed an autopsy the following day. She explained that due to the advanced state of decomposition, she took x-rays to determine whether any projectiles or sharp objects remained in the body. Dr. Kohler stated that her external autopsy of Jessie's body revealed a very advanced state of decomposition, and the portion of her body which had been in contact with the ground was largely skeletonized. The remaining flesh on the body was dark, dried out, and leather-like. Dr. Kohler stated that she was able to observe the fetus inside Jessie's body during her external autopsy. The medical examiner went on to explain that she was able to get a good visualization of the skeletal remains of the baby. Dr. Kohler reiterated that Jessie's body was in an advanced stage of putrefaction with the drying out of the skin and the exposure of bones. She explained certain conditions affected the speed at which putrefaction occurs. Those conditions include a hot environment and exposure which would allow insects access to the body. As a result of her external autopsy, Dr. Kohler was unable to observe any external signs of

recent injury. She further testified that dental records were used to positively identify the body as that of Davis.

{¶29} Dr. Kohler examined the bones to look for injuries. However, the medical examiners from her office were not able to recover all of the bones despite searching the scene a second time. Dr. Kohler called in forensic anthropologists to assist her in the examination of the bones. The examination did not identify any injuries to the bones which had been recovered. Toxicology tests were also performed on some of the remaining internal organ tissues, as no fluid remained in the body. The results of these tests showed there were no detected drugs in the tissue. Dr. Kohler ruled the death as unspecified homicidal violence. Dr. Kohler explained:

{¶30} "What that indicates is the circumstances around her disappearance and her discovery and evidence obtained during the investigation indicate that Ms. Davis had come to harm at the hands of another individual.

{¶31} "Because of the stage of decomposition and putrefaction of the tissues, I could no longer identify what type of injury had resulted in her death, but the fact that she is found some great distance from her home wrapped in bedding and left out in the open field is evidence that that [sic] there was homicidal intent here. A natural death would not occur under those circumstances. Suicide would not be an issue in this situation. And based on circumstances an accident was also ruled out. Therefore, it would be a homicidal death. Unfortunately, I am unable to say exactly how the death occurred." (Feb. 8, 2008, T. at 1276).

{¶32} Dr. Kohler explained it is possible to asphyxiate a person using one's arm, either by placing the forearm against the front of the victim's neck, or placing the victim's neck in the crook of the arm and applying pressure on either side. Dr. Kohler stated that the condition of Jessie's body prevented a determination of whether she had been manually strangled. The condition of the body also impeded Dr. Kohler's ability to make any findings as to whether Davis had been stabbed or shot. Dr. Kohler found no trauma to the fetus, and opined the fetus died as a result of maternal death. Dr. Kohler added Davis was thirty-seven weeks pregnant and the fetus was viable on June 14, 2007.

{¶33} Upon conclusion of Dr. Kohler's testimony, the State rested its case. At that time, Appellant made an oral Crim.R. 29 Motion for Acquittal. After the parties argued their respective positions, the trial court overruled the motion.

{¶34} During the defense's case, Appellant testified on his own behalf. Appellant recalled that he met Davis at a nightclub in late February or early March, 2004, when Appellant was separated from his wife. He recalled that he and Davis had sexual relations that night and that sometime later in the year, he learned that she was pregnant with Blake, who was born on December 3, 2004.

{¶35} Appellant stated that he and his wife Kelly reconciled in early September, 2004. He stated that paternity for Blake was established in April, 2005, and that thereafter he began giving Davis child support and visiting Blake on a weekly basis. When asked about the incidents involving Davis and his wife,

Appellant stated that he never confronted Davis because "there was nothing going on" between him and Davis at that time. Appellant acknowledged he and Davis became intimate again in 2005, after he and his wife separated again. He stated that in early November, 2006, he and Davis engaged in sexual relations at a time when Appellant and his wife "had some issues." Appellant subsequently learned that Davis was pregnant again after Davis contacted his wife and told her. Appellant testified that his wife moved out in February, 2007 Appellant continued to see Davis because of visitation with Blake, however, he claimed the two were not intimate.

{¶36} During his testimony, Appellant adamantly denied making the statement to Richard Mitchell that he should kill Davis and throw her body in the woods. Appellant also testified that while he and Mitchell were friendly, Mitchell was not his best friend.

{¶37} Appellant went on to testify that on June 10, 2007, he received a couple of text messages from Davis asking him if he was at work and telling him that she thought she might be in labor and might need him to watch Blake. Appellant stated that he told Davis he would take care of Blake while she went to the hospital. Appellant also recalled he and Davis discussed when he could watch Blake during the week of June 11, 2007. Appellant says he told Davis he could watch Blake on Thursday, his day off. Appellant stated that afterwards, he remembered that football practice was starting that week so he made arrangements with his friend, Myisha Ferrell, to watch Blake on that day. Appellant explained that Ferrell had asked him if she could borrow $100.00. Appellant says he offered to pay

her $20.00 for watching Blake and loan her $80.00, which she would have to pay back.

{¶38} Appellant next testified to his actions on June 13, 2007. Appellant stated he had worked the previous night, with his shift ending at 8:00 a.m. on June 13, 2007. He then described what he did throughout the course of his day, prior to attending a softball game which started at 6:30 p.m. Appellant stated he spoke with Davis on his way to the softball game and informed her he planned on picking up Blake that evening around 10:00 p.m. He says that he and some other teammates stayed after their softball game was over and watched the second game of the evening. Appellant says he telephoned Davis and told her he was going to Champs Bar after the game and if he had anything to drink, he would not pick up Blake that evening, but would get him the next morning by 6:00 a.m. Appellant says he then proceeded to Champs Bar where he drank four or five beers and socialized with friends, including Denise Haidet, leaving at approximately 1:00 a.m. Appellant stated he then drove to Stephanie Hawthorne's house, where he stayed until 2:00 a.m. before heading home. Appellant recalled that he spoke with Hawthorne on his cell phone on his way home.

{¶39} Appellant testified that he woke up at 5:20 a.m. on June 14, 2007, and drove to Jessie's house, arriving at approximately 5:45 a.m. Appellant stated he entered the home through the garage, which Davis would leave open when she was expecting him to come for Blake. Appellant says he knocked on the door, entered the house and called for Davis, who responded from upstairs. Appellant says he went upstairs, found Davis on the floor in her bedroom, and asked her what

was wrong and if she was in labor. Appellant says Davis told him she was tired and nauseous. Appellant says he then asked her to get Blake ready and when Davis did not promptly get up, he again asked her to hurry up. Appellant stated that when she still did not respond quickly, he helped her get to her feet. Appellant admitted that he could tell Davis was trying to get her bearings once she was on her feet, but he still pushed her to hurry up as he wanted to get home and get more sleep. Appellant testified that Davis rebuked him, stating "If you weren't out last night with your friends all night, you wouldn't be rushing me now." (February 11, 2008, T. at 201). Appellant recalled he responded that what he did was not her concern, and he did not have to be there and could instead get Blake over the weekend. Appellant stated he then attempted to leave, but Davis stepped in front of him and grabbed his shirt. Appellant said he pulled away and tried to step around Davis, but she again moved in front of him. Appellant testified that Davis then grabbed him, telling him he could not leave because she needed to go to work. Appellant said he replied that he could leave if he could get her out of his way. Appellant stated he then pretended to stick his finger up his nose and put it in her face, and that Jessie bit his finger. Appellant said he looked at his finger and told Davis he was "definitely leaving now, I don't care if you have to work or not." Id. at 205.

{¶40} Appellant testified he next stepped around Davis and she grabbed him and told him he could not leave. He stated that in an attempt to free himself from Jessie's grasp, he pulled his arm away and threw back his elbow, which struck Davis in the throat area. Appellant stated he was heading toward the door when he heard Davis fall, and he turned around and saw her

lying on the floor. He testified that he went over to her and asked if she was all right, but she did not respond. Appellant says that he shook Jessie's shoulders and again asked her if she was all right but she remained unresponsive. Appellant testified that he unsuccessfully attempted CPR but was unable to find a pulse. Appellant went on to testify that he saw a bottle of bleach, and that he poured some into the cap and placed it under Jessie's nose in an attempt to revive her. Appellant explained that he knocked over the bleach bottle when he stood up. Appellant offered that he did not call 911 because he was unable to turn on Jessie's cell phone, which he located in its charger. Appellant acknowledged that he had his two cell phones in his truck but did not think about getting one from the vehicle to call 911. Appellant says he then collapsed, crying and fell back onto Jessie's bed, pushing the mattress off the box spring. Appellant claims he decided to leave without seeking help, because he knew he would never be able to explain what had occurred. He says that he checked on Blake and, finding him asleep, decided to leave him there while he went to get Ferrell to watch him. Appellant testified he then decided to take Jessie's body with him, placing her in the bed of his truck.

{¶41} Appellant says that when he arrived at Ferrell's house he told her that he needed her to come with him immediately. Appellant claims he intended to return to Jessie's house and have Ferrell watch Blake while he went to the police to explain the situation. Instead, he said that as the two were driving north on Interstate 77, he realized he was going to have a difficult time explaining why he moved Jessie's body. Appellant stated that he passed the exit for Jessie's house and continued to drive north. Appellant

admitted that at approximately 7:10 a.m., he called Jessie's phone, but says he could not explain why he did so. Appellant said he exited the highway with the intention of returning to Jessie's house. Appellant recalled that he stopped at a rest area in order for Ferrell to use the restroom. Appellant recalled that he next traveled back onto the highway, but a state trooper passed them and he panicked and again exited the highway. He claims he then decided to travel back to Canton on back roads. Appellant testified he did not know where he was and drove around for at least a half an hour looking for a familiar landmark, eventually turning onto a dirt road into a park, where he made the decision to leave Jessie's body there.

{¶42} Appellant went on to testify that after leaving the park, he instructed Ferrell to throw Jessie's phone out the window because he could not get the phone to work and he did not need it. Appellant stated that Ferrell told him she needed cigarettes, so he stopped at a convenience store which had a carwash. Appellant explained that he decided to wash the car because his windshield wiper fluid would not work and there were bugs all over the windshield. Appellant recalled that prior to getting back on the highway, he deposited a garbage bag of trash, as well as a pillow from Jessie's bed into a dumpster.

{¶43} Appellant went on to explain that he continued with a normal daily routine, thinking the whole situation would go away. Appellant stated that he contacted the head football coach to tell him he would be late for practice, then stopped and picked up bags of mulch because he and his daughter had planned to mulch the flower beds at his house that day. Appellant says that he went back to his house,

took a shower and continued with his schedule for the day. Appellant acknowledged he did not even think about Blake, as he just wanted the whole situation to go away. Appellant recalled that after football practice, he signed papers for a bank loan and then picked up his daughter. He returned to his house and picked up Ferrell to take her home. Appellant recalled that he stopped at Wal-Mart to buy his daughter a snow-cone maker and later that evening coached basketball.

{¶44} Appellant worked the 10:00 p.m. to 8:00 a.m. shift, and says that he planned to leave early to pick up Blake. He testified that he left the station at 7:45 a.m. on June 15, 2007, and was heading toward Jessie's house. He then received a call from Jessie's sister, telling him that Jessie was missing. Appellant says that he arrived at Jessie's house and was relieved to find Blake was safe. Although Appellant knew what had happened, he stated that he was unable to explain what occurred to the authorities because he feared they would not believe him. Appellant testified that it was sometime during the middle of the following week that he decided he had to end the charade because Jessie's family and his family had been through so much. On Saturday, June 23, 2007, Appellant and his attorney proceeded to the FBI office where Appellant disclosed the general location of Jessie's body. Appellant ultimately led authorities to that location.

{¶45} On cross-examination, the State elicited testimony from Appellant regarding his financial situation, including the increase in child support which would occur with the birth of Jessie's baby and from any obligation resulting from his divorce. Appellant admitted he applied for and received a loan, and that he paid approximately $2800 a month for various

debts. The State also inquired of Appellant as to his actions on the morning of June 14, 2007. When asked why he did not get Blake ready instead of hurrying Davis, Appellant explained they had a routine and she was the one who would get Blake ready while he put the car seat in his truck. Appellant acknowledged after Davis fell, he did not retrieve his own cell phone out of his truck in order to call 911 when he was unable to turn on Jessie's phone. Appellant also conceded his attempts at CPR only lasted a few minutes. Appellant stated his actions following Jessie's death and the disposal of the body were an attempt to maintain a sense of normalcy in the hopes that what had happened actually had not happened. Appellant could not explain why he continued to conceal the whereabouts of Davis during the week following her disappearance.

{¶46} The defense rested its case following Appellant's testimony. Appellant renewed his Crim.R. 29 Motion for Acquittal and, during discussion of the jury instructions, requested the trial court instruct the jury on the lesser-included offense of involuntary manslaughter for counts one and two. The trial court denied this request.

{¶47} After hearing all the evidence and deliberations, the jury found Appellant not guilty of aggravated murder as alleged in Count 1 of the Indictment, but guilty of the lesser-included offense of murder. The jury also found Appellant guilty of the remaining charges and specifications. The trial court scheduled a separate mitigation phase of the trial. At the conclusion of this hearing, the jury recommended Appellant be sentenced to life in prison with parole eligibility after serving thirty years for the two

aggravated murder convictions relative to the death of Davis's unborn child. The trial court accepted the jury's recommendation for the two counts of aggravated murder but merged the offenses for purposes of sentencing. The trial court sentenced Appellant to an aggregate term of imprisonment of fifty-seven years to life.

{¶48} It is from this conviction and sentence Appellant appeals raising the following assignments of error:

{¶49} "I. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED CHARGE OF INVOLUNTARY MANSLAUGHTER.

{¶50} "II. THE TRIAL COURT ERRED IN ITS DENIAL OF DEFENDANT'S REQUEST FOR MISTRIAL AND ITS FAILURE TO FIND THAT THE JURY'S VERDICT WAS INCONSISTENT AS A MATTER OF LAW.

{¶51} "III. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE.

{¶52} "IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.

{¶53} "V. APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶54} "VI. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXPAND THE PROSPECTIVE JURY VENIRE THROUGH THE USE OF DRIVERS LICENSE RECORDS.

{¶55} "VII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE WITH REGARD TO HEARSAY STATEMENTS MADE BY BLAKE.

{¶56} "VIII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISCLOSE GRAND JURY TESTIMONY.

{¶57} "IX. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE AS TO INTRODUCTION OF TESTIMONY THAT IS PREJUDICIAL PURSUANT TO EVIDENCE RULE 403.

{¶58} "X. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CAPITAL SPECIFICATIONS OF THE INDICTMENT.

{¶59} "XI. THE TRIAL COURT COMMITTED A REVERSIBLE ERROR BY SENTENCING DEFENDANT TO MAXIMUM AND CONSECUTIVE SENTENCES ON ALL OF THE COUNTS AND BY FAILING TO MAKE A FINDING THAT THE CHARGES OF MURDER, AGGRAVATED MURDER AND AGGRAVATED BURGLARY ARE ALLIED OFFENSES WHICH SHOULD BE MERGED AND SERVED CONCURRENT TO EACH OTHER.

{¶60} "XII. THE TRIAL COURT ERRED IN REFUSING TO REMOVE PROSPECTIVE JURORS WHO PARTICIPATED IN THE SEARCH FOR THE VICTIM JESSIE DAVIS FOR CAUSE.

{¶61} "XIII. THE TRIAL WAS TAINTED BY SYSTEMATIC PREJUDICE AND PROSECUTORIAL MISCONDUCT."

I

{¶62} In the case sub judice, Appellant argues that it was error for the trial court to refuse to give a jury instruction on involuntary manslaughter. We disagree.

{¶63} Appellant was charged with three counts of Aggravated Murder: Count One for the death of Jessie Davis, pursuant to R.C. §2903.01(B), and two counts for the death of Jessie Davis's unborn child: Count Two for the unlawful termination of Jessie Davis's pregnancy pursuant to R.C. §2903.01(B), and, Count Three for the death of another who is under the age of thirteen pursuant to R.C. §2903.01(C).

{¶64} Appellant requested instructions on the lesser included offenses of murder and involuntary manslaughter based on counts one and two.

{¶65} R.C. 2903.04(B), Involuntary Manslaughter, provides:

{¶66} "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree..."

{¶67} In this case, Appellant submits that the predicate misdemeanor offense was domestic violence under R.C. §2919.15(B), which states:

{¶68} "(B) No person shall recklessly cause serious physical harm to a family or household member."

{¶69} In order to warrant an instruction on domestic violence, Appellant would have had to present some evidence that he engaged in an argument with Jessie that resulted in him recklessly causing serious physical harm to a family member.

{¶70} The trial court gave an instruction on murder but refused to give the instruction on involuntary manslaughter.

{¶71} Involuntary manslaughter as set forth in R.C. §2903.04 is a lesser included offense of felony murder as set forth in R.C. §2903.01. *State v. Deem,* (1988) 40 Ohio St.3d 205, 533 N.E.2d 294. However, an instruction on a lesser included offense needs to be provided "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, 216, 533 N.E.2d 286.

{¶72} Trial courts have broad discretion in determining whether the evidence adduced at trial was sufficient to warrant a jury instruction. *State v. Morris,* Guernsey App. No. 03CA29, 2004-Ohio-6988, reversed on other grounds, 109 Ohio St.3d 313, 847 N.E.2d 1174, 2006-Ohio-2109; *State v. Mitts* (1998), 81 Ohio St.3d 223, 228, 690 N.E.2d 522. "When reviewing a trial court's jury instructions, the proper standard of

review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Sims,* Cuyahoga App. No. 85608, 2005-Ohio-5846, ¶ 12, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. A trial court does not abuse its discretion by not giving a jury instruction if the evidence is insufficient to warrant the requested instruction. *State v. Lessin* (1993), 67 Ohio St.3d 487, 494, 620 N.E.2d 72. An "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, (internal citations omitted.)

{¶73} When comparing aggravated murder and murder as charged in this case to involuntary manslaughter, it is the mental state of the accused that distinguishes one offense from the other. *State v. Brown* (Feb. 29, 1996), Cuyahoga App. No. 68761. The offenses of aggravated murder and murder require proof that the accused acted purposely, or with specific intent to cause the death of another. See R.C. §2903.01; §2903.02; 2901.22(A). The culpable mental state of involuntary manslaughter is supplied by the underlying offense, in this case, "recklessly." See *State v. Campbell* (1991), 74 Ohio App.3d 352, 358-359, 598 N.E.2d 1244. Thus, an instruction on involuntary manslaughter should be given when, on the evidence presented, the jury could reasonably find against the State on the element of purpose, and find that the Appellant acted recklessly in taking the lives of Jessie Davis and her unborn child.

{¶74} The culpability level of recklessness is defined in R.C. §2901.22(C), which provides:

{¶75} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶76} Based upon our review of the record, we find that the evidence presented at trial does not uphold the theory that Appellant acted recklessly in his actions. The basis for the involuntary manslaughter instruction was Appellant's claim that he did not intend to kill Jessie and her unborn child. The premise on which Appellant requested the involuntary manslaughter instruction was the underlying charge of domestic violence. There was no evidence that Appellant engaged in the act of domestic violence. The evidence presented at trial shows either that he acted purposely or accidentally, depending upon which story the jury believed. Appellant did testify that he did not intend to hurt anyone.

{¶77} At trial, when describing the events leading up to Jessie Davis's death, Appellant testified:

{¶78} "Q: And when you try to leave, tell the jury what occurs.

{¶79} "A: She stepped in front of me and she grabbed me and she said, You can't go anywhere. She goes, You have to watch Blake so I can go to work.

{¶80} "Q: Where does she grab you at?

{¶81} "A: She grabbed me by my shirt, like this.

{¶82} "Q: Okay. And what did you do in response to her grabbing you by the shirt at that time?

{¶83} "A: I pulled away from her and I said, you know, I don't.

{¶84} "Q: Did you try to step around her?

{¶85} "A: Yes.

{¶86} "Q: Were you able to?

{¶87} "A: No. She stepped in front of me again.

{¶88} "Q: Okay. What happened on the second time that she stepped in front of you?

{¶89} "A: I said, You know what, I'm trying to leave. I don't have to be here. You, you're taking your time and I can be sleeping. And –

{¶90} "Q: Did you feel like she was deliberately taking her time at this time based on her statement that she had made to you regarding having been out last night?

{¶91} "A: I don't know if she was deliberately taking her time, but she was very adamant that I couldn't leave because she needed to go to work.

{¶92} "Q: Okay. So the second time, ah, that she grabbed you, where does she grab you at, Bobby?

{¶93} "A: She actually grabbed my arm and – and pushed me back like, so I couldn't leave.

{¶94} "Q: Okay. And what did you do in response to that?

{¶95} "A: I said, Oh, well, I can leave and I can get you out of my way, and I pretended that I put my finger up my nose and I put it out in her face and she bit me. She bit my finger.

{¶96} "Q: How hard did she bite your finger?

{¶97} "A: She bit it pretty hard. She clamped down on my finger and I pulled it out of her mouth.

{¶98} "Q: And did that surprise you?

{¶99} "A: Yeah. I, I didn't expect for her to bite me. I thought she would move and I'd go by. I didn't expect her to bite me.

{¶100} "***

{¶101} "A: I stepped back and I looked at my finger and I was like, you know what, I'm definitely leaving now, I don't care if you have to go to work or not, and I went to step around her and she grabbed me and said I couldn't leave and I pulled my arms from her.

{¶102} "Q: Okay.

{¶103} "A: I, I pulled my arm and I threw my elbow back. And it connected.

{¶104} "Q: Bobby, were you making an effort to get Jessie off of you at that time?

{¶105} "A: I just, I just wanted to leave.

{¶106} "Q: Were you trying to get her arms off of you?

{¶107} "A: I just wanted – I swung, I swung my elbow just so she wouldn't grab anymore.

{¶108} "Q: And where did that elbow land?

{¶109} "A: Like in her throat area.

{¶110} "Q: In her throat area?

{¶111} "A: Yeah.

{¶112} "Q: What happened as a result of that?

{¶113} "A: She hit the ground.

{¶114} "Q: How hard did she fall?

{¶115} "A: She fell pretty hard. I didn't expect her to fall in the first place, but she fell pretty hard." (Feb. 11, 2008, T. at 202-206).

{¶116} Appellant stated that he "didn't mean to hurt her." (Id. at 218). When asked what was going through his head at that time, he stated that he was thinking, "This can't be happening. * * * I never tried to hurt anyone." (Id. at 221). He again stated that he "don't want anybody to be hurt. I didn't try to hurt anyone." (Id. at 223). He continued to repeat himself

that he did not mean to cause harm to Jessie or Baby Chloe. When asked by his attorney on redirect if he ever tried "in any way" to cause harm to Jessie or the fetus, he responded, "I didn't try to cause harm to Jessie or the fetus." He further stated that he did not intend to strike Jessie in the throat with his elbow. (Id. at 318).

{¶117} Based on the foregoing, we find that the evidence did not establish that Appellant acted with heedless indifference to the consequences or that he perversely disregarded a known risk that his conduct was likely to cause a certain result or was likely to be of a certain nature. But this evidence, if accepted by the jury, would constitute a complete defense to the charges of aggravated murder and murder. That is, the jury was obligated to choose between Appellant's complete defense of lack of any intent to harm Jessie or her unborn child, (i.e. accident), and therefore acquittal, or the commission of the crimes of aggravated murder and murder. Although presentation of a complete defense does not automatically preclude a lesser-included-offense instruction, *State v. Wilkins*, 64 Ohio St.2d at 387-388, 415 N.E.2d 303, Appellant has presented no evidence that he was reckless in his actions. See, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791.

{¶118} A mere failure to perceive or avoid a risk, because of a lack of due care, does not constitute reckless conduct. *Columbus v. Akins* (Sept. 27, 1984), Franklin App. No. 83AP-977, 1984 WL 5923. Instead, one must recognize the risk of the conduct and proceed with a perverse disregard for that risk. *State v. Covington* (1995), 107 Ohio App.3d 203, 206, 668 N.E.2d 520; *State v. Whitaker* (1996), 111 Ohio App.3d

608, 613, 676 N.E.2d 1189 (noting that to be reckless, "one must act with full knowledge of the existing circumstances").

{¶119} In contrast to the actor who proceeds with knowledge of a risk, the failure of a person to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature is negligence. R.C. §2901.22(D). Recklessness requires more than ordinary negligent conduct. The difference between the terms "recklessly" and "negligently" is normally one of a kind, rather than of a degree. "Each actor creates a risk of harm. The reckless actor is *aware* of the risk and disregards it; the negligent actor is *not aware* of the risk but should have been aware of it." (Emphasis sic.) Wharton's Criminal Law (15th Ed.1993) 170, Section 27; see, also, *State v. Wall* (S.D.1992), 481 N.W.2d 259, 262.

{¶120} According to Appellant's version of events, he was simply trying to leave Jessie Davis's apartment and was trying to pull away from her and extricate himself from her grasp when her death occurred.

{¶121} The evidence as presented by Appellant, if believed by the jury, established that Appellant caused the deaths of Jessie Davis and her unborn child as the result of an unintentional act, an accident. Accident is defined as a "mere physical happening or event, out of the usual order of things and not reasonably anticipated as a natural or probable result of a lawful act." 4 Ohio Jury Instructions 75, Section 411.01(2). Moreover, "[a]n accidental result is one that occurs unintentionally and without any design or purpose to bring it about." Id.

{¶122} Where the theory of the defense is predicated on an accident, as was evident through the testimony of Appellant and through defense counsel's tenor throughout the trial, an instruction on involuntary manslaughter is inappropriate. Courts have repeatedly held that where a defendant presents a theory of accident, it is improper to instruct on lesser included offenses such as negligent homicide, (see e.g., *State v. James*, Stark App.No. 2005-CA-00076, 2006-Ohio-271, *State v. Gay* (Nov. 2, 1990), Portage App.No. 88-P-2043, citing *State v. Hill* (1987), 31 Ohio App.3d 65. See also *State v. Wiley* (Mar. 4, 2004), Franklin App.No. 03 AP-340; *State. v. Georgekopoulos* (Nov. 25, 1998), Summit App.No. 18797; *State v. Samuels* (Sept. 24, 1987), Cuyahoga App.No. 52527). Moreover, "the defense of accident is totally inconsistent with a request for a jury instruction with regard to involuntary manslaughter or negligent homicide in that each of these offenses possess the element of intent and/or criminal culpability." Appellant argues that the death of the victim did not involve the element of intent or criminal culpability.

{¶123} Appellant made the tactical decision to argue that he had no culpability for the deaths in this case. To later argue that Appellant was culpable for such deaths, but to a lesser extent, would have been wholly inconsistent with the defense theory.

{¶124} Moreover, evidence of the purposefulness of Appellant's actions was presented at trial. Appellant told his friend, Richard, who testified at trial, that he was going to "kill that bitch and throw her in the woods." Additionally, the coroner testified that a strike to the throat such as Appellant described would not cause asphyxiation and that constant pressure would

need to be applied in order to cause death by asphyxiation. Specifically, the coroner stated that the person would have to apply continual pressure for a period of several minutes in order for the person to go unconscious first and then die. While the body was too decomposed for the doctor to determine a specific cause of death, the doctor noted that there were no fractures to the skull or ribs or any other trauma to the bones. Appellant also fled the scene and did not call 9-1-1. He then disposed of the body in the middle of a forested area where wild animals were likely to ravage the body and then proceeded to lie to the police for days. Appellant only confessed once he knew that the officers placed him with Jessie's cell phone in the area where he disposed of her body.

{¶125} The nature of the evidence presented shows both purpose and consciousness of guilt in his actions following Jessie's murder. For Appellant to argue at trial that he did not mean to kill Jessie and her unborn child, and then to request an instruction that he engaged in an act of domestic violence would be disingenuous and inconsistent with the evidence presented. See *State v. Irwin*, Hocking App. Nos. 03CA13, 03CA14, 2004-Ohio-1129.

{¶126} For these reasons, we find that the trial court's decision to deny Appellant's request for an instruction on the lesser included offense of involuntary manslaughter was not unreasonable, arbitrary or unconscionable. Appellant's first assignment of error is overruled.

II

{¶127} In his second assignment of error, Appellant contends the jury's conviction for Appellant's murder of Davis is inconsistent with the convictions for Appellant's aggravated murder of Davis's unborn child, and that the trial court committed reversible error in denying a mistrial on that basis. We disagree.

{¶128} The standard of review for evaluating a trial court's decision to grant or deny a mistrial is abuse of discretion. *State v. Graewe*, Tuscarawas App.No. 2007 AP 10 0070, 2008-Ohio-5143, ¶ 46, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Generally, "[i]nconsistency in a verdict does not arise out of inconsistent responses to different counts, but rather inconsistent responses to the same count." *State v. Gardner*, Montgomery App. No. 21027, 2006-Ohio-1130, ¶33, citing *State v. Adams* (1978), 53 Ohio St.2d 223; *State v. Lovejoy* (1997), 79 Ohio St.3d 440. Furthermore, an inconsistent verdict may very well be a result of leniency and compromise by the jurors, rather than being caused by jury confusion. *State v. Fraley*, Perry App.No. 03CA12, 2004-Ohio-4898, ¶ 15, citing *United States v. Powell* (1984), 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461. See, also, *State v. Ballard* , Cuyahoga App.No. 88279, 2007-Ohio-4017, ¶ 17.

{¶129} To reiterate, Count One of the indictment in the case sub judice charged the crime of the

aggravated murder of Jessie Davis and alleged that Appellant purposely caused her death while committing or fleeing immediately thereafter the crime of aggravated burglary. (Feb. 12, 2008, T. at 171-172). In addition to the charge of aggravated murder, Count One also included two specifications which would serve to enhance the potential penalty for aggravated murder to include a death sentence. The jury found the Defendant not guilty of the crime of aggravated murder in the death of Jessie Davis, but guilty of murder, and thereby implicitly determined that he did not in fact purposely cause her death in the commission of an aggravated burglary. As instructed, the jury therefore did not consider the two death penalty specifications to Count One of the indictment.

{¶130} Counts Two and Three of the indictment charged Appellant with aggravated murder in purposefully causing the unlawful termination of Jessie Davis's pregnancy and/or the death of her unborn child, while committing or fleeing immediately thereafter the offense of aggravated burglary, and with aggravated murder in purposely causing the death of another who is under thirteen years of age at the time of the commission of the offense. (Feb. 12, 2008, T. at 201-202, 229). The same two specifications as contained in Count One of the indictment were also attached and required the jury to make a finding as to their application by evidence beyond a reasonable doubt. (Id. at 215-219). In addition, a third specification was set forth requiring the jury to find that the viable unborn human child of Jessie Davis was a child under 13 years of age at the time of the commission of aggravated murder. (Id. at 220, 229).

{¶131} The jury, following instructions which included the lesser included offense of murder, returned its verdicts which, inter alia, found Appellant not guilty of the crime of aggravated murder as alleged in Count One of the indictment relative the death of Jessie Davis, but guilty of the lesser included offense of murder. Additionally, the jury found Appellant guilty of aggravated murder in both Counts Two and Three of the indictment, as well as all of the specifications, relative to the death of the unborn child. At the conclusion of the reading of the verdicts, defense counsel moved the trial court to declare a mistrial and argued that the verdicts as to Counts One, Two and Three were inconsistent as a matter of law and should be vacated. The trial court denied Appellant's motion for mistrial.

{¶132} Appellant presently directs us to the State's direct examination of Dr. Lisa Kohler, in support of his underlying proposition that there was no allegation of separate animus or action in deliberately causing the death of the unborn child by independent acts:

{¶133} "Q: As part of the autopsy did you also have an opportunity to examine the fetal remains?

{¶134} "A: Yes, I did.

{¶135} "Q: Did you examine those bones for trauma?

{¶136} "A: Yes.

{¶137} "Q: Did you observe any trauma?

{¶138} "A: No, I did not.

{¶139} "Q: Based upon the autopsy, the training and education that you have had and your experience, do you have an opinion as to a reasonable degree of medical certainty as to the cause of death of the fetus in this case?

{¶140} "A: Yes, I do.

{¶141} "Q: Could you tell these folks what that is?

{¶142} "A: The fetus died a (sic) result of maternal death.

{¶143} "Q: So when Jessie died, the fetus died?

{¶144} "A: That's correct." (Trial T. at 1302-1303).

{¶145} The gist of Appellant's argument is that the jury's verdicts under the facts of this case were inconsistent where the jury found Appellant guilty of murder of Davis, which by definition lacked the finding of the underlying offense of aggravated burglary, and where the jury found him guilty of the purportedly simultaneous aggravated murder of the unborn child during the commission of an aggravated burglary.

{¶146} Aggravated burglary is defined as follows under R.C. 2911.11(A)(1): "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other

than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if *** [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶147} Notwithstanding the additional evidence that the unborn child was viable and may have been able to survive her mother's death (Trial T. at 1242-1244, 1303-1304), along with Appellant's complete failure to take any measures to thereupon save the unborn infant, we find, upon review of the record, that the jurors may have properly inferred that Appellant's acts of physical harm to Davis, once inside the apartment, where his violent acts would have removed Davis's permission for him to be there, constituted aggravated burglary for purposes of the elevated charge of aggravated murder regarding the unborn child. Moreover, because the second aggravated murder conviction concerning the unborn child (Count Three) was separately premised on Appellant's act of purposely causing the death of another who is under thirteen years of age (R.C. 2903.01(C)), which conviction was merged for sentencing purposes, we find Appellant has failed to demonstrate prejudicial error upon appeal.

{¶148} Accordingly, we hold the trial court's denial of the motion for mistrial on the allegation of inconsistent verdicts was not arbitrary, unreasonable or unconscionable.

{¶149} Appellant's second assignment of error is overruled.

III

{¶150} In his third assignment of error, Appellant contends the trial court erred in denying his motion for a change of venue.

{¶151} Appellant explains, "After receipt and review of the juror questionnaires and the initial phase of the jury selection process, Defendant filed a motion seeking a change of venue due to detailed knowledge of the allegations amongst the vast majority of the venire." Appellant's Brief at 13-14. The trial court conducted a hearing on Appellant's motion on February 1, 2008, and subsequently denied the request.

{¶152} Both parties agree the standard of review to be applied is abuse of discretion. In order to find an abuse of discretion, we must find the trial court's decision constituted more than an error of law, that the ruling was unreasonable, arbitrary, or unconscionable. *State v. McKnight,* 107 Ohio St.3d 101, 2005-Ohio-6046.

{¶153} The State counters the examination of jurors during voir dire affords the best test to determine prejudice from pretrial publicity. We agree. Extensive exposure to pretrial publicity does not, in and of itself, preclude the seating of a fair and impartial jury. A jury venire is not required to be ignorant of the facts and issues of a particular case. Voir dire is the mechanism for determining whether a fair and impartial jury can be seated.

{¶154} The State adds the record does not support Appellant's argument a change of venue was

mandated because Appellant "deliberately" chose not to include a transcript of the extensive voir dire which took place in this case. Upon questioning by this Court at oral argument, Appellant responded he complied with App.R. 9(B) by serving notice on the State that he was not ordering the entire transcript of the voir dire and included a statement of the assignment of error he intended to present on appeal with regard to this issue. The State did not elect to seek supplementation of the record with the entire transcript of voir dire. Appellant concluded, therefore, the presumption of regularity under *Knapp v. Edwards Lab.* (1980), 61 Ohio St.2d. 197, 199,does not apply.

{¶155} Regardless, Appellant still has the affirmative duty to demonstrate in the record prejudicial error. As we previously stated, prior knowledge acquired through pretrial publicity does not equate to the inability to seat a fair and impartial jury. While such prejudice may have been evident from review of the entire voir dire process, the limited portion of the transcript Appellant chose to include in the appellate record does not affirmatively demonstrate prejudicial error. Appellant claims there was ". . . an overwhelming likelihood of prejudice . . ." Appellant's Brief at 15. Such speculation or conclusion is not a substitute for demonstration of error and prejudice in the record.

{¶156} Appellant's third assignment of error is overruled.

IV, V

{¶157} Appellant's fourth and fifth assignments of error have some overlap; therefore, we shall address said assignments of error together.

{¶158} In his fourth assignment of error, Appellant maintains the trial court erred in denying his Crim.R. 29 Motion for Acquittal with respect to the three counts of aggravated murder set forth in Counts One, Two, and Three of the Indictment.

{¶159} In his fifth assignment of error, Appellant challenges his convictions as against the manifest weight and sufficiency of the evidence.

Crim.R. 29 Motion for Acquittal

{¶160} Crim. R. 29(A) requires a trial court, upon motion of the defendant, to enter a judgment of acquittal of one or more offenses charged in an indictment if the evidence is insufficient to sustain a conviction of the offense or offenses. However, a trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. On appeal of the denial of a Crim.R. 29(A) motion, the "relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91, 660 N.E.2d 724, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶161} Appellant was indicted on three counts of aggravated murder, in violation of R.C. 2903.01(A), (B), and (C) which provides:

{¶162} "(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

{¶163} "(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

{¶164} "(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense."

{¶165} Appellant asserts he was entitled to judgments of acquittal on the three aggravated murder charges as the State failed to present any evidence to establish the mens rea of purposeful. We disagree. Based upon the evidence produced during the State's case-in-chief as set forth in our Statement of the Facts and Case, supra, we find there was more than sufficient evidence to support the trial court's decision to overrule Appellant's Crim.R. 29 Motion for Acquittal.

Standard of Review – Sufficiency and Manifest Weight of the Evidence

{¶166} In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, superseded by constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at para. two of the syllabus.

{¶167} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, citing *State v. Martin* (1983), 20 Ohio

App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, para. one of the syllabus.

Counts One and Two

{¶168} Given our disposition of Appellant's first assignment of error, we find Counts One and Two were supported by substantial, competent and credible evidence as outlined in our Statement of the Facts and Case, supra; therefore, we find rational jurors would have found Counts One and Two proven beyond a reasonable doubt, and the convictions were not against the sufficiency of the evidence. Furthermore, upon review, we conclude the verdicts were not against the manifest weight of the evidence.

Count Three

{¶169} Appellant was found guilty of aggravated murder, in violation of R.C. 2901.01(C), as alleged in Count Three of the Indictment.

{¶170} R.C. 2901.01(C) provides:

{¶171} "(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense."

{¶172} Appellant contends an unborn fetus does not constitute a person "under thirteen years of age"; therefore, his conviction in Count Three is against the

manifest weight and the sufficiency of the evidence. We disagree.

{¶173} R.C. 2901.01(B)(1) defines "person" as follows:

{¶174} "(B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

{¶175} "(I) An individual, corporation, business trust, estate, trust, partnership, and association;

{¶176} "(ii) An unborn human who is viable."

{¶177} Dr. Polifrone, Davis's obstetrician, and Dr. Kohler, the Summit County Medical Examiner, both testified the unborn child was viable and she would have survived had she been born on or about June 14, 2007. Because Davis's fetus was capable of independently surviving her mother at the time of Davis's death, we find Chloe, by statutory definition, was a person under thirteen years of age. Accordingly, we find Appellant's conviction on Count Three was neither against the manifest weight nor the sufficiency of the evidence.

Count Four – Aggravated Burglary

{¶178} Appellant was convicted of aggravated burglary, in violation of R.C. 2911.11(A)(1), which provides:

{¶179} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in

a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶180} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another. * * *"

{¶181} Appellant argues he did not trespass in Davis's home. Although Appellant may have had consent to enter Davis's home to pick up Blake, once he committed an act of violence against Davis, the consent was revoked and Appellant became a trespasser. Where a defendant commits an offense against a person in the person's private dwelling, the defendant forfeits any privilege, becomes a trespasser and can be culpable for aggravated burglary. See, e.g., *State v. Steffen* (1987), 31 Ohio St.3d 111, 115. The jury's conviction on Count Four was not against the manifest weight or the sufficiency of the evidence.

{¶182} Based upon the foregoing, we overrule Appellant's fourth and fifth assignments of error.

VI

{¶183} In his sixth assignment of error, Appellant submits the trial court erred in denying his motion to expand the prospective jury venire through driver's license registrations. Appellant asserts drawing the venire solely from registered voters deprived him of his Sixth Amendment right to a jury drawn from "a fair cross section of the community". See, generally, *State*

v. Fulton, (1991), 57 Ohio St.3d 120, para. two of the syllabus.

{¶184} The Sixth Amendment to the United States Constitution does not require that petit juries "mirror the community and reflect the various distinctive groups in the population." *Taylor v. Louisiana* (1975), 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690. However, the method employed for selecting the groups from which juries are drawn "must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id.

{¶185} In *Duren v. Missouri* (1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579, the United States Supreme Court set forth the prerequisites a defendant must satisfy in order to establish a prima facie violation of *Taylor's* fair cross-section requirement:

{¶186} "[T]he defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is due to systematic exclusion of the group in the jury-selection process." Id. at 364, 95 S.Ct. at 668.

{¶187} For purposes of fair, cross-section analysis, African-Americans are a distinctive group. *State v. Jones* (2001), 91 Ohio St.3d 335, 340, 744 N.E.2d 1163. However, with respect to the second prong of the *Duren* test, Appellant has failed to prove African-Americans in Stark County are unfairly

represented in venires relative to their numbers in the community. Appellant has also failed to satisfy the third prong of *Duren,* as he has not presented any evidence of systematic exclusion of AfricanAmericans. Appellant simply argues, without more, voter registration rolls result in the systematic exclusion of African-Americans.

{¶188} As Appellant has failed to satisfy the second and third prong of the *Duran* test, we find no error in the trial court's denial of Appellant's motion to expand the prospective jury venire. See, e.g., *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio2126 at ¶103-106. (Calling of venire solely from voter registration list as opposed to list of licensed drivers did not violate defendant's right to fair and impartial jury.)

{¶189} Appellant's sixth assignment of error is overruled.

VII

{¶190} In his seventh assignment of error, Appellant contends the trial court erred and abused its discretion in denying his motion in limine relative to out-of-court statements made by two-year-old Blake to Sergeant Weisburn of the Stark County Sheriff's Department. We disagree.

{¶191} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or

judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. The grant or denial of a motion in limine is an interlocutory and preliminary order. See *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-201. The failure to proffer or object at trial does not preserve the issue for appellate review. Id. at 203. In order to preserve the matter for appeal, the parties must renew their motions or objections at the appropriate time during trial. *Forbus v. Davis* (Sept. 25, 2000), Stark App.No. 1999-CA-0382, citing *State v. Brown* (1988), 38 Ohio St.3d 305, paragraph three of the syllabus.

{¶192} In the case sub judice, after a hearing on appellant's motion in limine, the trial court found Blake's statements were admissible under the excited utterance exception to the hearsay rule. The trial court further found, in regard to the issue of right to confrontation under the Sixth Amendment, that the statements were admissible because they were part of the ongoing emergency investigation being conducted by the police at the time. Appellant presently not only does not identify where in the record he objected to this testimony at trial, but also fails to assert he even objected at trial. As such, we find Appellant has waived this argument. However, even if we had determined the alleged error was preserved for our review, we would overrule it on the merits, as discussed below.

Hearsay Issue

{¶193} Evid.R. 803(2), an exception to the hearsay rule, provides: "Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The Ohio Supreme

Court, in *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234, emphasized that " * * * an appellate court should allow a wide discretion in the trial court to determine whether in fact a declarant was at the time of an offered statement still under the influence of an exciting event." Id. at 219, 373 N.E.2d 1234. Furthermore, "[w]hen the statements are those of * * * a child of tender years, the lapse of time between the event and the declaration has been expended [sic], thus recognizing the reality that 'a child victim of a crime may be under stress caused by the events for a longer period of time than adults.' " *State v. Reed* (May 31, 1991), Lake App. No. 89-L14-130, quoting *State v. Kunsman* (Mar. 30, 1984), Lake App. No. 9-252, at 6.

{¶194} Appellant herein asserts the passage of more than twenty-four hours from the time of the incident to the time of the conversation with Sergeant Weisburn demonstrates Blake's statements were not made while still under the stress or excitement of the event. However, we hold that where Blake was only two years old at the time and had been left alone for an extended period of time after the trauma-filled events surrounding his mother's disappearance, the record supports the trial court's conclusion that Blake's out-of-court statements to the officer qualified as excited utterances.

Confrontation Clause Issue

{¶195} Appellant further contends his Sixth Amendment right to confrontation was violated as a result of the admission of Blake's statements, although Appellant again does not identify where in the record he presented this argument to the trial court. The Confrontation Clause of the Sixth Amendment to the

U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify, and the defendant has had a prior opportunity for cross-examination.

{¶196} In *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, the Ohio Supreme Court established the "primary purpose" test for the issue now before us: "To determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' (*Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224, followed.)" Id. at paragraph one of the syllabus.

{¶197} Upon review, we find the trial court did not abuse its discretion in determining the statements were admissible as part of an ongoing emergency investigation which satisfied the "primary purpose" test of *Siler*. Appellant's suggestion that an

"immediate emergency" was lacking because of the passage of over twenty-four hours ignores the fact that Davis's whereabouts and condition were still unknown to law enforcement officials at the time of Blake's statements to Sergeant Weisburn. We conclude Blake's statements were non-testimonial in nature; therefore, they were not admitted in violation of Appellant's right to confrontation. *Crawford*, supra.

{¶198} Finally, Appellant asserts error in the trial court's admission of similar statements Blake made to his grandmother. Appellant again fails to reference where in the record the alleged error occurred or whether he objected to it. We find any such statements would merely be cumulative to the statements Blake made to Sergeant Weisburn, which we have already found to have been properly admitted.

{¶199} Accordingly, Appellant's seventh assignment of error is overruled.

VIII

{¶200} In his eighth assignment of error, Appellant asserts the trial court erred in denying his motion to disclose grand jury testimony.

{¶201} Ohio Crim.R. 6(E) provides:

{¶202} "Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who

transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

{¶203} Grand jury testimony is secret by nature, and will remain such, absent a showing by the defendant of a particularized need which outweighs the need for secrecy. *State v. Greer* (1981), 66 Ohio St.2d 139. A particularized need exists when the circumstances show a probability the accused will be denied a fair trial without the grand jury testimony. *State v. Davis* (1988), 38 Ohio St.3d 361. A trial court has discretion to decide when a particularized need exists, and thus will not be reversed absent an abuse of discretion. *State v. Greer,* supra.

{¶204} Appellant argues a particularized need existed for two reasons. First, the State failed to provide Appellant with admissions he made to witnesses and/or to his codefendant, Myisha Ferrell, when the State's case-in-chief was premised solely upon those alleged admissions. Second, the State allegedly failed to produce any evidence of a burglary upon which one of the death specifications was based.

{¶205} A review of the record reveals the State complied with the requirements of Crim.R. 16 and provided Appellant with the names of the witnesses it intended to call at trial as well as the exculpatory statements he made to Myisha Ferrell. Additionally, a review of the Bill of Particulars and the State's responses to Appellant's motions to dismiss reveal Appellant was put on notice of the case law the State intended to rely upon to establish the revocation of privilege to support the aggravated burglary charge. Accordingly, we find the trial court did not abuse its discretion in denying Appellant's request for the disclosure of grand jury testimony.

{¶206} Appellant's eighth assignment of error is overruled.

IX

{¶207} In his ninth assignment of error, Appellant argues the trial court erred in denying his motion in limine as to the introduction of testimony of four witnesses as such was prejudicial pursuant to Evid.R. 403.

{¶208} A motion in limine is a tentative, interlocutory, precautionary ruling by the trial court

reflecting its anticipatory treatment of an evidentiary issue. *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-201. The established rule in Ohio is the grant or denial of a motion in limine is not a ruling on the evidence. Id. The ruling is preliminary and thereby requires the parties to raise specific evidentiary objections at trial in order to permit the trial court to consider the admissibility of the evidence in its actual context. Id. "At trial it is incumbent upon a defendant, who has been temporarily restricted from introducing evidence by virtue of a motion in limine, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." Id. at 203. Failure to proffer the evidence waives the right to appeal the granting of the motion. Id.

{¶209} The record herein reveals Appellant did, in fact, object at trial to the testimony he sought to have excluded in his motion in limine. As such, the matter is properly before this Court for review.

{¶210} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. Therefore, we will not disturb a trial court's evidentiary ruling unless we find said ruling to be an abuse of discretion; i.e. unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶211} Evid.R. 403(A) provides:

{¶212} "(A) Exclusion mandatory

{¶213} "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶214} Specifically, Appellant asserts the State presented the testimony of Jill Butler, Stephanie Hawthorne and Jennifer Sprout for the sole purpose of impeaching his character. The testimony of these women showed Appellant engaged in numerous sexual relationships while he was either still married to or separated from his wife. Appellant also sought to exclude the testimony of Todd Porter, a reporter for The Repository, a local newspaper, who conducted an interview with Appellant during the week following Davis's disappearance. Appellant avers the State presented this testimony for the sole purpose of impeaching his character through untruthful statements made shortly after the offense, as well as his failure to disclose any involvement therein.

{¶215} We find the trial court did not abuse its discretion in admitting the testimony of Stephanie Hawthorne. When Appellant initially spoke with law enforcement officials on June 15, 2007, he indicated he left Champs Bar on the evening of June 13, 2007, and proceeded directly to his home. However, it was later learned Appellant left Champs Bar and arrived at Hawthorne's home at 1:00 a.m. on June 14, 2007, and stayed with her until 2:00 a.m. Hawthorne spoke to Appellant at 2:12 a.m., after he had left her residence. Hawthorne also testified she was pregnant with Appellant's child and had terminated the pregnancy on June 13, 2007. We find the probative value of Hawthorne's testimony was not outweighed by any unfair prejudice, as it established Appellant's

whereabouts a few hours prior to Davis's death and it directly challenged his credibility as to the events surrounding Davis's death.

{¶216} Jill Butler and Jennifer Sprout both testified they were involved in sexual relationships with Appellant. Butler called Appellant on his cell phone at approximately 10:30 p.m. on June 13, 2007. Butler also called Appellant on June 15, 2007, after hearing on the news a pregnant woman was missing and her boyfriend was a Canton Police Officer. Butler called Appellant "out of curiosity" to see if he knew who the officer was. Appellant was asleep when Butler called. She apologized for waking him and stated she would talk to him later. Jennifer Sprout testified she and Appellant were together the weekend before Davis's disappearance. Sprout spoke to Appellant after the news story broke. During the conversation, Appellant told Sprout he could not believe Davis was missing. Although the testimony of Butler and Sprout was only marginally relevant and we recognize the potential prejudice to the Appellant from disclosure of additional sexual relationships, we find the trial court did not abuse its discretion in allowing such testimony as Appellant's tendency to engage in adulterous sexual relationships had already been established and any further testimony was merely cumulative.

{¶217} Todd Porter, a reporter from the Canton Repository Newspaper, testified regarding the interview he conducted with Appellant during the week following his disappearance. Richard Mitchell, Appellant's friend at the time, contacted Porter to give Appellant an opportunity to tell his side of the story. Prior to the interview, Appellant spoke with his attorney and reviewed the questions Porter intended

to ask him. Appellant denied any knowledge about the disappearance of Davis and told Porter he hoped she would be found alive. We find Porter's testimony was relevant as to Appellant's behavior following Davis's disappearance. We find the trial court did not abuse its discretion in admitting the testimony.

{¶218} Appellant's ninth assignment of error is overruled.

X

{¶219} In his tenth assignment of error, Appellant argues the trial court erred by failing to dismiss the capital specifications of the Indictment because such specifications had no foundation in law or fact.[1] Specifically, Appellant challenges the capital specification alleging he caused the death of two or more persons in the course of conduct, one being the death of a child under the age of 13. Appellant also takes issue with the sufficiency of the allegations for a capital specification due to the commission of an aggravated burglary.

{¶220} Following the mitigation phase of the trial, the jury did not recommend the death penalty. Because capital punishment has ceased to be an issue in this case, we find the arguments raised herein to be moot.[2]

---

[1] Again, Appellant failed to reference where in the record he made this argument to the trial court.

[2] Furthermore, we found in our discussion of Appellant's fourth and fifth assignments of error, supra, the jury's verdict as to the aggravated burglary count was not based upon insufficient

{¶221} Accordingly, we overrule Appellant's tenth assignment of error.

XI

{¶222} In his eleventh assignment of error, Appellant claims the trial court erred by sentencing him to maximum, consecutive sentences on all the counts and failing to find the charges of murder, aggravated murder and aggravated burglary to be allied offenses which should be merged and served concurrent to each other.[3]

Sentencing Issues

{¶223} In support of his initial argument, Appellant relies in part on R.C. 2929.14(C), which states as follows: "Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in section 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under

---

evidence and was not against the manifest weight of the evidence.

[3] We note appellant's statement of the assignment of error itself does not specifically identify by number which aggravated murder counts of the Indictment he claims to be allied offenses. By process of elimination, we find the reference to the murder charge necessarily involves Count One. We presume reference to the aggravated murder charge involves Count Two.

division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section." Appellant similarly asserts the trial court gave no consideration to the jury's findings and rejected their recommendation when sentencing Appellant to an aggregate term of 57 years to life in prison. Appellant also contends the trial court violated the United States Supreme Court's holding in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, by considering numerous "factors" neither submitted nor proved to the jury. Appellant's Brief at 37.

{¶224} However, Appellant's reliance on R.C. 2929.14(C) is unfounded. That subsection was severed from R.C. 2929.14 in *State v. Foster* (2006), 109 Ohio St.3d 1. In *Foster*, the Supreme Court held, inter alia: "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at syllabus para. 7. An abuse of discretion implies the court's attitude is "unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 157. The fact the trial court's aggregate sentence exceeded the jury's recommendation is not determinative.[4] Based upon our review, we do not find the trial court abused its

---

[4] Appellant notes the jury found him not guilty of the most serious offense of aggravated murder as to Davis and recommended a sentence of 30 years in prison rather than life without parole. The jurors were not asked to make recommendations relative to the aggravated burglary count, the two counts of abuse of a corpse, or the child endangering count. Furthermore, the jury's recommendation did not include consideration of whether the sentences were to run concurrently or consecutively.

discretion in rendering maximum and consecutive sentences.

Allied Offense Issues

{¶225} In *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract. Id. at 636.

{¶226} In further clarifying *Rance*, the Court, in *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, syllabus, instructed as follows:

{¶227} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." According to *Cabrales*, the sentencing court, if it has initially determined that two crimes are allied offenses of similar import, then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. *Id.* at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶228} The Eighth Appellate District has described the *Cabrales* clarification as a "holistic" or "pragmatic" approach, given the Ohio Supreme Court's concern that *Rance* had abandoned common sense and logic in favor of strict textual comparison. *State v. Williams,* Cuyahoga No. 89726, 2008-Ohio-5286, ¶ 31, citing *State v. Sutton,* Cuyahoga App. No. 90172, 2008-Ohio-3677. This court has referred to the *Cabrales* test as a "common sense approach." *State v. Varney,* Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23.

{¶229} The Ohio Supreme Court revisited the issue of allied offenses of similar import in *State v. Brown,* 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569. The Court first found that aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2) are not allied offenses of similar import when comparing the elements under *Cabrales,* but did not end the analysis there. The Court went on to note that the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. *Id.* at 454. The Court concluded that while the two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the intent of the legislature is clear from the language of the statute. Id. In the past, the Court had looked to the societal interests protected by the relevant statutes in determining whether two offenses constitute allied offenses. Id., citing *State v. Mitchell* (1983), 6 Ohio St.3d 416. The Court concluded in *Brown* that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest of

preventing physical harm to persons, and were therefore allied offenses. Id. at 455.

{¶230} Most recently, the Ohio Supreme Court addressed this issue in *State v. Winn,* 121 Ohio St.3d 413, 2009-Ohio-1059. In *Winn,* the Court considered whether kidnapping and aggravated robbery are allied offenses of similar import. In ultimately finding such offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." Id. at ¶ 6. We noted in *Varney,* supra, that the Ohio Supreme Court in *Brown* expanded the first step of the allied offense analysis by adding the additional factor of societal interests protected by the statutes. *Varney,* at ¶ 16, citing *State v. Boldin,* Geauga App. No. 2007-G-2808, 2008-Ohio-6408. In light of the Supreme Court's analysis in *Winn,* societal interest may be a tool to be used in some circumstances in determining if the intent of the legislature is clear from the criminal statutes being compared. See *State v. Mills,* Tuscarawas App.No. 2007AP070039, 2009-Ohio-1849, ¶ 212.

Comparison of Murder to Aggravated Burglary

{¶231} We herein first address the question of whether the conviction for the murder of Davis is an

allied offense of similar import to the aggravated burglary conviction.

{¶232} Ohio's murder statute, R.C. 2903.02(A), states: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy."

{¶233} Aggravated burglary, under R.C. 2911.11(A)(1), states: "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if *** [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶234} Under the first *Cabrales* step, in comparing the elements of murder with aggravated burglary in the abstract, we find the commission of one offense will not necessarily result in the commission of the other. We therefore hold murder is not an allied offense of similar import to aggravated burglary as charged in this case.

Comparison of Aggravated Murder to Aggravated Burglary

{¶235} We next address the question of whether the conviction for the aggravated murder of Davis's unborn child is an allied offense of similar import to the aggravated burglary conviction.

{¶236} R.C. 2903.01(B), aggravated murder, states in relevant part as follows: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit *** aggravated burglary ***."

{¶237} As stated previously, aggravated burglary, under R.C. 2911.11(A)(1), states: "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if *** [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶238} Appellant thus was convicted of aggravated murder based on a predicate offense, as well as the predicate offense itself. Under the first *Cabrales* step, in comparing the elements of aggravated murder with aggravated burglary (R.C. 2911.11(A)(1)), in the abstract, we find the offenses are sufficiently similar that the commission of one offense will result in the commission of the other. Nonetheless, applying *Brown* and *Winn*, and taking the common sense approach indicated in *Varney*, we conclude that the aggravated murder statute as charged is meant to protect persons from death during an aggravated burglary, while the aggravated burglary statute is meant to protect the integrity of occupied residences and buildings.

{¶239} We therefore hold the trial court did not err in rendering consecutive sentences for aggravated murder vis-a-vis aggravated burglary, as they are not crimes of similar import. Moreover, similar to our conclusion in Appellant's second assigned error, supra, because the second aggravated murder conviction concerning the unborn child (Count Three), which the court merged for sentencing purposes, was premised on appellant's act of purposely causing the death of another who is under thirteen years of age (R.C. 2903.01(C)), which conviction would not involve the predicate aggravated burglary offense, we find Appellant has failed to demonstrate prejudicial error upon appeal.

Comparison of Aggravated Murder to Murder

{¶240} We thus reach the remaining question of whether the convictions of the murder of Davis and the aggravated murder of her unborn child are allied offenses of similar import.

{¶241} Generally, where a defendant commits a crime against two victims, each offense is necessarily committed with a separate animus. See, e.g., *State v. Scheutzman*, Athens App.No. 07CA22, 2008-Ohio-6096, ¶ 12; *State v. Luce* (Dec. 12, 1980), Lucas App.No. L-79-317, 1980 WL 351657. We recognize in the case sub judice that the death of the unborn child resulted from maternal death. However, as we discussed in Appellant's second assigned error, the evidence demonstrated Appellant's complete failure to take any measures to save the unborn child following the fatal injuries to Davis. Therefore, separate animus existed between the murder offense (Davis) and the aggravated murder offense (the

unborn child), and we find no reversible error in the trial court's decision not to merge said offenses for sentencing purposes.

{¶242} Appellant's eleventh assignment of error is therefore overruled.

XII

{¶243} In his twelfth assignment of error, Appellant maintains the trial court erred by refusing to remove for cause from the venire those prospective jurors who had participated in the search for Davis.

{¶244} As part of the voir dire process, the prospective jurors were given written questionnaires; one of which concerned whether the individual or any members of his/her family had participated in the search. Appellant submits the purpose of this question was to eliminate any potential juror who had already formed any emotional attachment to the victims or the case itself. Appellant sought removal for cause of those jurors who gave a positive response to the question. The trial court denied removal for cause.

{¶245} One of the challenged prospective jurors was eventually seated on the jury after Appellant had exercised all of his preemptory challenges. Appellant concludes, " . . . it is difficult to imagine a more potentially prejudicial circumstance could arise" and to allow the juror in question to serve "* * * is a blatant miscarriage of justice and demonstrates an unconscionable act on the part of the Trial Court that is an overwhelming abuse of discretion." Appellant's Brief at 38.

{¶246} This Court has concerns about the propriety of allowing any individual who either participated or had an immediate family member participate in the search for Davis. We believe the better practice would have been to excuse any such prospective juror for cause to avoid any possibility of partiality or bias on the part of the jury. However, we agree with the State that participation in the search, standing alone, is insufficient to affirmatively demonstrate the juror in question could not be fair and impartial. As set forth in our discussion of Appellant's third assignment of error, the failure to transcribe the entire voir dire makes an affirmative demonstration of prejudicial error difficult, if not impossible. We find no such demonstration here.

{¶247} Appellant's twelfth assignment of error is overruled.

XIII

{¶248} In his final assignment of error, Appellant maintains his trial was tainted by systematic prejudice and prosecutorial misconduct. Without reference to any specific place in the record, Appellant broadly states, "A mere review of the docket and the multiple motions filed by the Defendant which were all denied reveals a patent question of prejudice. In addition, the subsequent events during the trial itself further illustrate such bias and prejudice." Appellant's Brief at 39. We summarily reject Appellant's broad claims for failure to comply with App. R.16.

{¶249} Appellant does later set forth several examples to support his claim of systematic prejudice and prosecutorial misconduct. The first example is the trial court's allowing an individual, who had previously

participated in the search for Davis, to serve as a juror. We addressed this issue in our discussion of Appellant's twelfth assignment of error, supra, and found no affirmative demonstration of prejudicial error.

{¶250} Appellant's next example is the trial court's permitting the State, over his objection, to refer to the unborn fetus by the name, "Baby Chloe," throughout the trial, and in the jury instructions, which repeatedly made reference to the unborn child by name. Appellant asserts this was an attempt by the State to establish sympathetic ties to the victim and bias the jury. Appellant cites no legal authority in support of this argument. W e find no error in such practice.

{¶251} Appellant's third example of systematic prejudice was the fact "any objections made by the defense were denied out of hand without any legal basis on support." Appellant's Brief at 39. This generalized assertion without specific reference to the record merits no further discussion by this Court.

{¶252} Appellant also points to the State's eliciting a hypothetical opinion from the medical examiner as to the cause of Davis's death and utilizing "graphic and disturbing photographs" in support.[5]

{¶253} Appellant has not separately assigned as error admission of the medical examiner's opinion nor admission of Exhibit 59. Accordingly, we will not

---

[5] We note in this instance Appellant does make reference to the record where the alleged error occurred.

presume such constituted error. We find Appellant's suggestion the same demonstrates systematic prejudice tantamount to prosecutorial misconduct is without merit.

{¶254} Finally, Appellant asserts all of his claims of error denied him a fair trial. Having found no merit as to all of his assigned errors, we reject Appellant's cumulative error argument.

{¶255} Appellant's thirteenth assignment of error is overruled.

{¶256} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By: Wise, J.

Delaney, J. concurs separately.

Hoffman, P. J., concurs in part and dissents in part.

/s/ John W. Wise

JWW/d 65

Delaney, J., concurring separately

{¶257} I concur with the majority in the disposition of all of Appellant's assignments of error. However, I submit a different analysis in regards to the disposition of assignment of error eleven. I disagree with the majority's finding in ¶238, in regards to

Davis's unborn child, that the offenses of aggravated murder and aggravated burglary are sufficiently similar that the commission of one offense will result in the commission of the other. The Ohio Supreme Court has held that aggravated murder and aggravated burglary are not allied offenses of similar import. *State v. Reynolds*, 80 Ohio St.3d 670, 681, 1998-Ohio-171, 687 N.E. 1358, 1371 (citations omitted); see also *State v. Harris*, __ Ohio St.3d__, 2009-Ohio-3323, at ¶¶12-13 (reaffirming that offenses are first viewed in the abstract under an allied offenses analysis). Also, as noted by the majority in ¶241, the aggravated murder offense was committed with a separate animus.

{¶258} Accordingly, I would affirm that portion of assignment of error eleven on those grounds.

JUDGE PATRICIA A. DELANEY

Hoffman, P.J., concurring in part and dissenting in part

{¶259} I concur in the majority's analysis and disposition of Appellant's Assignments of Error III, IV, V, VI, VII, VIII, IX, X, XII and XIII.

{¶260} I also concur in the majority's analysis and disposition of Appellant's argument concerning maximum and consecutive sentences as set forth in Appellant's Assignment of Error XI. I further concur in the ultimate disposition of Appellant's allied offenses

of similar import argument as set forth in Assignment of Error XI, but do so for a different reason.[6]

{¶261} I also concur in the majority's decision to overrule Appellant's Assignment of Error II. However, I would do so without reaching the merits of the issue at this time given my proposed disposition of Appellant's Assignment of Error I.[7]

{¶262} That leaves for my consideration Appellant's Assignment of Error No. I. I respectfully dissent from my colleagues' opinion. Prior to presenting my legal analysis of the issue presented therein, I offer the following preface to my opinion.

PREFACE

---

[6] Based upon my analysis of Appellant's Assignment of Error I, I find any discussion of Appellant's argument concerning allied offenses of similar import premature. Accordingly, I join in the majority's decision to overrule it because I would find it to be moot. However, I am not yet persuaded by the majority's analysis of this issue and express no opinion as to my agreement or disagreement with it.

[7] I am well aware of Ohio Supreme Court precedent that no error arises from inconsistent verdicts between multiple counts in an indictment. The Ohio Supreme Court held, in *State v. Conway* (2006), 108 Ohio St.3d 214, 2006-Ohio-791, consistency between the verdicts on multiple counts of an indictment is unnecessary because the counts of an indictment are not interdependent. Id. at 218. Although I believe the scenario presented in this case (the death of an unborn child proximately caused by the death of the mother) raises an interesting question as to whether an exception to that rule should be considered (i.e., the same conduct results in multiple counts so causally intertwined they should be deemed interdependent), my consideration of this issue is rendered moot by my proposed disposition of Appellant's Assignment of Error I.

{¶263} A defendant is not entitled to a perfect trial . . . one free from all error. But a defendant is entitled to a fair trial . . . one free from prejudicial error. Bobby Cutts deserves no more, but is entitled to no less.

{¶264} A former colleague, Judge Norman Putman, once observed in all his years as a county prosecutor, common pleas court judge and appellate court judge, he had never participated in a trial nor reviewed on appeal a case that was perfectly tried. My experience to date has been the same. This case provides no exception.

{¶265} The rules governing appellate practice and the standards of review this Court employs have been developed over centuries. The goal has been, and remains, to establish a framework providing consistent application of constitutional protections, legal precedent, rules of court and statutory enactments to all who are accused, both those justly accused and those falsely accused. Those same principles apply whether a defendant is appealing a shoplifting conviction or an aggravated murder conviction.

{¶266} Bobby Cutts was presumed innocent by the law until a jury of his peers found him guilty. A large segment of the public did not share that presumption. Nevertheless, having been found guilty by a jury, Bobby Cutts is no longer entitled to that presumption of innocence. But, the right to appeal does not belong only to the innocent who were wrongly convicted, but also to the guilty whose conviction was tainted by prejudicial error.

{¶267} I have never been involved with a case which has generated as much publicity, public interest

and sharply defined opinions as the case now before this panel. There appears to have been a rush to judgment by many in our community, and indeed across much of this country, as to Bobby Cutts' guilt long before the first piece of evidence was presented in court. This is not unexpected given the extensive media coverage, the fact a police officer was the defendant, the attendant human emotions generated by the death of an expectant mother and her unborn child, and the extensive, protracted search for Jessie Davis. But justice does not and should not rush to judgment. Though justice ought not to be unnecessarily delayed, the oft-quoted adage "justice delayed is justice denied" is, at times, inapposite to ensuring justice is served.

{¶268} I confess being somewhat dismayed by public reaction after The Repository featured an article in the Sunday edition about the upcoming oral argument. In the article, the names and pictures of this panel's members were displayed, something I can never recall having been done before.[8] While attending worship service that Sunday morning, I was engaged on two separate occasions by others quick to share their opinion the appeal was meritless and the death penalty should have been given.

{¶269} The next day as I drove to work, I was distraught to hear a local radio talk show host rant about what a waste of taxpayer money it was to even

---

[8] The composition of all appellate panels is announced well in advance of the day of oral argument and available to the public on this Court's website and on record with the Clerk of the Court of Appeals.

allow Bobby Cutts an appeal and, if it were up to him, Bobby Cutts should be put to death – not by lethal injection, but the "old fashioned way", using the gas chamber or electric chair. Audience building? Perhaps. Honest belief? I suspect so.

{¶270} The host's views were shared by many callers. It seems no one cared much for, nor rose to defend, the decision of those twelve jurors who spent weeks listening to the testimony of a multitude of witnesses, arguments of counsel, and instructions of law by the judge and were charged with the weighty duty to decide Bobby Cutts' guilt and ultimate fate. To second guess their decision without having "walked in their shoes" does them a severe disservice.

{¶271} I was further discouraged by both the volume and tenor of readers' comments to The Repository's Sunday article and subsequent article following the attorneys' oral argument in this Court. The vast majority of those commenting opined Bobby Cutts should not be allowed an appeal, one labeling it "frivolous crap", and many advocating the only way Bobby Cutts should be granted a new trial is if the death penalty is put back on the table.[9]

{¶272} Let me be quick to point out, the Constitution prohibits double jeopardy. The death penalty cannot be put back on the table. And I find the legal arguments raised in Bobby Cutts's appeal are

---

[9] My dismay, distraught and discouragement were relieved in part, by the thoughtful response attributed to Patty Porter regarding the prospect of a new trial. She responded she doesn't know what's best for everyone and only hopes something good comes out of this for all.

both complex and challenging. They are not "frivolous crap!"

{¶273} Judges are not insensitive to public sentiment nor shielded from such expressions of public outcry. We live and work in this community. We are elected by the voters in this district to serve. For the most part, we are respected because of the positions we hold, and hopefully for the quality of our work.

{¶274} As an appellate court judge, I have authored thousands of opinions and participated in many thousands more. Those unfamiliar with the work of this Court might be surprised by the volume and vast array of types of cases this Court routinely hears.[10] But often a judge is remembered only for one significant decision and his or her career is then defined by that decision. Perhaps the Bobby Cutts case will prove to be my legacy; albeit, an infamous one.

{¶275} God has blessed me with two children and graciously spared me the loss of a child or grandchild. I am saddened by the tragic loss of life this case presents and sympathize with the families of all involved. But, when I put on the robe as judge, I must not let my feelings, my emotions, much less public opinion, influence my review and application of the law. I am mindful of the admonition: ". . . do not pervert justice by siding with the crowd."[11]

---

[10] Other than lawyers and judges, few read our opinions and for the most part, we work in anonymity from the public's view.

[11] The Holy Bible, Exodus 23:2, New International Version, Copyright 1973, 1978, 1984.

{¶276} I anticipate my dissent will be met with disfavor by many in the general public and, although this Court's decision will be widely reported, few will read our actual words. I anticipate the attorneys for both sides will take issue with all or parts of my colleagues' and my legal analysis and an attempt to appeal to the Ohio Supreme Court is likely. I do not discourage nor shy from such further review by a higher court. To the contrary, if I or this Court have misapplied any law, improperly analyzed the record, or misinterpreted any legal precedent, I invite further review and welcome correction. However, at this time it is my task to decide this appeal, just as it was Judge Charles Brown's to preside over the trial.[12]

{¶277} Justice . . . a concept not always easily defined . . . as is often said of beauty, sometimes lies in the eye of the beholder. But the oath of office I have sworn charges me with the responsibility to administer justice without respect to persons, faithfully and impartially, to the best of my ability and understanding. Such responsibility feels, at times, burdensome. Yet, it is one I willingly chose to accept when I sought and assumed the bench.

ASSIGNMENT OF ERROR I

{¶278} Herein, Appellant challenges the trial court's decision not to instruct the jury on the lesser-included offense of involuntary manslaughter.

---

[12] I trust the public to understand, although I may find error in this case, I credit Judge Brown's overall handling of this very difficult trial as an example of judicial professionalism.

{¶279} The Ohio Supreme Court has adopted a two-pronged test to determine whether a jury instruction on a lesser-included offense is warranted. In *State v. Thomas* (1988), 40 Ohio St.3d 213, the Ohio Supreme Court held first the trial court must determine whether the offense in the requested instruction is a lesser-included offense of the charged crime by comparing their statutory elements. In doing so, the *Thomas* Court held involuntary manslaughter is a lesser-included offense of aggravated murder. The State of Ohio does not contest this prong has been satisfied.

{¶280} The second prong of the *Thomas* test requires an examination of the facts to determine whether there exists sufficient evidence to allow the jury to reasonably acquit on the greater offense and find the defendant guilty on a lesser-included or inferior degree offense. In considering whether the jury could reasonably conclude the defendant is guilty of the lesser offense, the persuasiveness of the evidence regarding the lesser offense is irrelevant and such evidence is to be construed in the light most favorable to the defendant. *State v. Conway* (2006), 108 Ohio St.3d 214, 2006-Ohio-791; *State v. Campbell* (1991), 74 Ohio Ap. 3d 352, 358.

{¶281} Whether the trial court judge or, for that matter, this Court finds the evidence offered in support of giving the lesser-included offense instruction credible does not matter. Because a defendant has a right to a trial by a jury of his or her peers, the issue is whether the jury could reasonably reject the greater offense, yet conclude the evidence supports a conviction for the lesser offense when the

evidence is considered in the light most favorable to the defendant.

{¶282} My conclusion as to whether the second prong of the *Thomas* test has been satisfied depends upon my resolution of whether the evidence could reasonably support the jury finding Appellant committed the crime "recklessly" as opposed to "purposely." The crimes of aggravated murder and involuntary manslaughter are distinguishable by 1) the requisite degree of *mens rea* the defendant possessed when committing the crime, and 2) the underlying predicate offense, i.e., death occurring during the commission of certain felonies or during the commission of a misdemeanor. I find the evidence reasonably could support the conclusion Davis's death occurred during the commission of misdemeanor domestic violence rather than aggravated burglary.[13,14]

{¶283} The *mens rea* necessary for commission of the aggravated murder count relating to the death of Davis (Count One) as charged under R.C. 2903.01(B)

---

[13] The focus of the argument in both parties' briefs concerns the requisite culpable mental state of Appellant. There is little discussion of the felony-misdemeanor distinction.

[14] The majority states Appellant would have had to present some evidence that he engaged in an argument with Jessie that resulted in his recklessly causing serious physical harm to a family member. Majority Opinion at ¶69. While the existence of an argument is not an element of the offense, I find the testimony quoted in the majority opinion clearly shows Appellant and Jessie were arguing.

is "purposely".[15] "Purposely" is defined in R.C. 2901.22(A) as follows:

{¶284} "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

{¶285} The *mens rea* necessary for commission of the lesser-included offense of involuntary manslaughter under R.C. 2903.04(B) is "recklessly".[16] "Recklessly" is defined in R.C. 2901.22(C) as follows:

{¶286} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶287} Appellant argues based upon his testimony concerning the circumstances surrounding his striking Davis in an effort to break free of her grasp in order to

---

[15] The trial court did instruct on the lesser-included offense of murder as to Counts One and Two, instructing the requisite culpable mental state for murder was "purposely".

[16] Because R.C. 2901.22(B) fails to specify any degree of culpability and does not plainly indicate a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense pursuant to R.C. 2901.21(B).

leave the residence and his self-professed lack of intent to cause her death – when considered in the light most favorable to him – could reasonably support the jury's concluding he did not purposely cause the death of Davis, but rather recklessly did so. I agree. I believe throwing his elbow back at neck level knowing Jessie was in the immediate vicinity could be considered reckless conduct . . . when Appellant's version of the facts is considered in the light most favorable to him.[17] While I believe there was more than sufficient evidence presented to support the jury's finding Appellant acted purposely,[18] I find there was sufficient evidence presented to warrant an instruction on the lesserincluded offense of involuntary manslaughter. However, my analysis does not end there.

{¶288} The State counters because Appellant proffered the complete affirmative defense of accident – one which if believed by the jury would result in a verdict of not guilty to both aggravated murder or involuntary manslaughter - he is not entitled to an instruction on the lesser-included offense of involuntary manslaughter. The State of Ohio argues, "Cutts' own testimony at trial claimed that he swung his elbow in an effort to get away from Davis, and that he did not intend to strike the pregnant woman in the throat, causing her apparent immediate death. Cutts did not testified [sic] that he recklessly struck Davis, but instead that he never intended to strike her." Appellee's Brief at 19, no citation to record included.

---

[17] This should not be interpreted as meaning I believe it was this act that caused Jessie's death or that I find Appellant's testimony credible.

[18] See, Discussion of Appellant's Assignment of Error V, supra.

The State concludes, "Thus, the evidence at trial did not support the requested instruction for involuntary manslaughter." Id. The State maintains because Cutts's own trial testimony establishes he accidently struck the fatal blow, the second prong of the *Thomas* test is not met.

{¶289} From my review of Appellant's opening statement, I find no mention of the affirmative defense of accident. The same holds true for Appellant's closing argument to the jury. Of particular note is the fact Appellant did not request an instruction on accident nor did the trial court instruct the jury on accident.

{¶290} I recognize there are some complete defenses that, by their nature, are inconsistent with acquittal of the greater charge and a finding of guilt on a lesserincluded offense.[19] For example, an alibi defense is a complete denial of the commission of the charged offense which would also preclude conviction on a lesserincluded offense instruction. Likewise, a defense based upon misidentification as the perpetrator of the charged offense would be inconsistent with a conviction on any lesser-included offense.

{¶291} However, in the case sub judice, Appellant admits committing the physical act which caused

---

[19] Even in some such cases, lesser-included offense instructions may be appropriate where elements other than the actual physical commission of the criminal act are disputed. For example, even where a complete defense of self-defense is presented in a felonious assault charge, a lesser-included offense instruction may still be warranted concerning whether the requisite degree of physical harm has been established.

Davis's death. That admission distinguishes this case from those types of complete defenses noted above. Whether Davis's and Chloe's deaths were ultimately determined by the jury to be accidentally caused (a complete defense resulting in not guilty verdict(s)); purposely caused (resulting in an aggravated murder or murder conviction(s)); or recklessly caused (resulting in involuntary manslaughter conviction(s)), I find all three conclusions are permissible and possible based upon the evidence presented.

{¶292} The State fervently maintains the evidence showed Appellant either purposely caused Davis's death, or accidently caused Davis's death; and the evidence could not support a conclusion he acted recklessly. Appellee's Brief at 21. Unlike the majority, I respectfully disagree.

{¶293} Even if I were to assume Appellant offered a complete defense of accident,[20] I do not believe accident and recklessness are necessarily so inapposite as to find a claim of accident forecloses a finding of recklessness. The fact Appellant swung his elbow in Davis's direction in an attempt to escape her grasp, knowing she was in close proximity, and striking her in the neck could be considered by a reasonable jury to have been an accident or to have been reckless. Neither inference is necessarily inconsistent with Appellant's statement he did not intend to kill Davis. Accordingly, I find it was error not to instruct on the lesser-included offense of involuntary manslaughter.

---

[20] From my review of the record I am not persuaded Appellant clearly did so, at least to the exclusion of the possibility he recklessly caused Davis's and Chloe's deaths.

{¶294} Again, my inquiry does not end there. I must next determine whether the failure to so instruct the jury constituted harmless or prejudicial error. That is, did the error affect a substantial right of Appellant to a fair trial? See, Crim.R. 52 (A). If there is a reasonable possibility the jury may have acquitted on the charged offense yet convicted on the lesser-included offense, the failure to instruct on the lesser-included offense affects a substantial right; therefore, is not harmless. *State v. Brown* (1992), 65 Ohio St.3d. 483. For the reasons that follow, I find a reasonable possibility does exist.

{¶295} The only direct testimony presented regarding how the deaths occurred is from Appellant himself. Most, if not all, of the other evidence of intent is circumstantial evidence.[21] Although the circumstantial evidence places Appellant's credibility clearly at issue, his *mens rea* remained very much in dispute.

{¶296} Much is made in the State's Brief of Appellant's statement to Myisha Ferrell "something bad happened." While I recognize the statement may infer a consciousness of guilt and criminal intent, the statement itself would not be out of the norm even if Davis's and Chloe's deaths were accidentally or recklessly caused.

---

[21] I understand circumstantial evidence is not inferior to direct evidence and the circumstantial evidence in the case sub judice does support the jury's determination Appellant acted purposefully.

{¶297} Still more problematic is establishing the cause of death to be something other than what Appellant claims. There is no expert medical testimony from Dr. Kohler, the medical examiner, after autopsy to definitely determine how Davis's death occurred.[22]

{¶298} I find the Ohio Supreme Court's discussion of lesser-included offenses in *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, particularly instructive.[23] In *Conway*, the Supreme Court specifically declared the presentation of a complete defense does not automatically preclude a lesser-included offense instruction. Id. at 240.

{¶299} As in this case, the trial court in *Conway* instructed on the charged offense of aggravated murder and the lesser-included offense of murder, but refused to instruct on the lesser-included offense of involuntary manslaughter. The Ohio Supreme Court found the trial court did not error in refusing to do so because the evidence did not support an instruction on involuntary manslaughter. The *Conway* Court found the defendant's testimony he pulled the trigger as fast

---

[22] I recognize Appellant's delay in leading the authorities to the body, and the state of decomposition resulting therefrom, is circumstantial evidence from which the jury could infer a purposeful act.

[23] The majority briefly cites to *Conway* for the proposition Appellant presented no evidence his actions were reckless. Majority Opinion at ¶117. No further discussion of *Conway* is offered by the majority. I note all the cases cited by the majority in their analysis of this assignment of error were decided before *Conway*. I find the issue in *Conway* to be the same as the case sub judice and an understanding and application of *Conway* crucial to my decision.

as he could and fired eight shots at two victims, the fact the defendant hit each victim four times, and the fact the final shots were fired at defenseless victims at close range contradicted the defendant's testimony he did not have purpose to kill. Id. That evidence would not allow a jury to reasonably acquit on aggravated murder (purpose to kill) yet convict on involuntary manslaughter (recklessly cause death). Appellant's testimony in this case stands in marked contrast to the defendant's testimony in *Conway*. Unlike Conway, there was no such clear and direct evidence of purpose to kill in this case.

{¶300} In *Conway*, the Ohio Supreme Court went further to declare even if it was error not to instruct on involuntary manslaughter, it would be harmless error because the rejection of the option to convict on the lesser-included offense of murder showed the jury would also have rejected the still lesser offense of involuntary manslaughter. Id. The same cannot be said to have occurred in this case because the jury did invoke the option to convict Appellant on the lesser-included offense of murder in Count One.

{¶301} Accordingly, I conclude the failure to instruct the jury on the requested lesser-included offense of involuntary manslaughter was prejudicial error. It was for the jury to consider whether Appellant acted purposely or recklessly.

{¶302} The question now becomes which count(s) in the Indictment does my conclusion affect.

{¶303} Appellant argues " . . . the jury could have determined that the death of Jessie Davis was recklessly caused while in the commission of a

misdemeanor offense, namely domestic violence." Appellant's Brief at 5.[24] Appellant's Brief does not separately make a similar argument concerning Chloe's death. Later, Appellant again claims, "The sole evidence presented by the State of Ohio as to the circumstances leading to the death of Jessie Davis was offered in the testimony of Co-Defendant Myisha Ferrell." Appellant's Brief at 7. Again, no mention is specifically made as to Chloe's death.

{¶304} In its Brief, the State asserts the jury instruction request went only to Davis's death, and not to the subsequent death of Chloe. Appellee's Brief at 19.[25]However, I note in the concluding sentence of this portion of his argument, Appellant does urge the reversal of the convictions [plural]. Thus, I must determine whether the request for instruction on involuntary manslaughter went to all three aggravated murder counts or only the one involving the death of Jessie Davis in Count One.[26]

{¶305} The trial court and counsel for both parties had the following discussion relative to Appellant's

---

[24] Contrary to App. R.16(A), Appellant fails to reference where in the record this argument was presented to the trial court. Appellant repeats this failure throughout his Brief.

[25] I find it surprising Appellant did not choose to file a Reply Brief in this case.

[26] Appellant does argue " . . . there was one single act that resulted in all of the offenses outlined in Counts One, Two and Three . . ." in his argument of his second assignment of error. Appellant's Brief at 12.

request for an instruction on involuntary manslaughter:

{¶306} "The Court: Counsel for the defendant, do you request an instruction on involuntary manslaughter?

{¶307} "Ms. Ranke: Yes, Your Honor, we believe that pursuant to Ohio Revised Code 2903.04 the jury could also consider the evidence, ah, and find Mr. Cutts guilty of the lesser included offense of murder, which would be involuntary manslaughter, with the argument that the defendant did cause the death of the victim in this case, Jessie Davis, while in the commission or while a proximate result of committing or attempting to commit the crime of domestic violence, a misdemeanor. * * *

{¶308} "* * * this goes to the idea the death was caused in a reckless act.

{¶309} "Again, the use of an elbow, the use of force, ah, can be deemed excessive, can be deemed recklessly causing serious physical harm and in actuality, under voluntary manslaughter, causing the death of another while in a reckless state.

{¶310} "We believe that is one of the alternatives the jury could find based upon the evidence again produced by the State of Ohio through the testimony of Myisha Ferrell, as well as through the testimony of Mr. Cutts, himself; * * *

{¶311} "The Court: Thank you.

{¶312} "State of Ohio?

{¶313} "Ms. Hartnett: Your Honor, we would object to that instruction for several reasons.

{¶314} "Ah, first of all, contrary to defense counsel's assertions, I don't recall any testimony produced on behalf of the State of Ohio that would support that particular theory.

{¶315} "The Court has to be convinced that there is sufficient credible evidence, ah, that there would be, ah, the evidence, ah, that there would be, ah, the evidence of this misdemeanor offense and I don't think that, that there is any credible evidence that supports that theory of a misdemeanor occurring.

{¶316} "* * *

{¶317} "In the event that the Court were to consider instructing on, ah, the misdemeanor offense, that same evidence could certainly support the offense of felonious assault and thereby a section be murder because death did result.

{¶318} "* * * I think what the evidence supported that was produced by the defendant, if believed, is accident and he said that repeatedly, that that's what it was and, ah, I think that if any other instruction were to be considered, it wouldn't be the involuntary manslaughter, * * *

{¶319} "Ms. Ranke: * * * the issue of the credibility of the evidence goes to the state's own witness, once again, Myisha Ferrell.

{¶320} "Myisha Ferrell, as I indicated earlier, testified, ah, that Mr. Cutts acknowledged, ah, an

argument, an altercation, something bad happening. That can be construed as the commission of an offense in causing her death.

{¶321} "In addition, he identified her as being his son's mom.

{¶322} "She [Myisha Ferrell] testified, again, the state's own witness, that it was Blake's mother, she knew that, that all goes to the relationship, which is a requisite element of domestic violence.

{¶323} "The difference between a murder and the crime of involuntary manslaughter, obviously, goes to the idea of the intent and although the evidence can be construed as an accident, it also can be construed, because of the nature of the force, whether or not it was appropriate under the circumstances, can be construed as reckless, which would then go to the idea of involuntary manslaughter.

{¶324} "* * * this was also brought out by Mr. Cutts' testimony, who did acknowledge the use of his elbow, the use of force, that led to the events causing her death. Ah, a struggle with regard to the scratches, that's all the evidence, produced by both the state and further corroborated by the testimony elicited on the defense's case.

{¶325} "* * *

{¶326} "The evidence in its totality can only support reckless, which would be a misdemeanor and that should be the crime, underlying crime set forth in an involuntary instruction, which we are requesting.

{¶327} "The Court: Thank you very much.

{¶328} "Applying the appropriate standard, the Court is not going to instruct on involuntary manslaughter. The court does not find that it's warranted by the evidence.

{¶329} "And the Court notes the objection of counsel for the defendant to the Court's ruling."

{¶330} February 12, 2008 Tr. at 33-39.

{¶331} Because the death of Chloe resulted from the same act, albeit indirectly, which proximately caused the death of Davis, I find the lesser-included offense instruction would apply equally to both counts of aggravated murder alleging Davis's and Chloe's deaths occurred during the commission of an aggravated burglary. (Counts One and Two of the Indictment). However, I do not believe the same analysis necessarily applies with respect to the charge of aggravated murder of Chloe based upon causing the death of a person under age thirteen (Count Three of the Indictment). This charge is not dependent upon death occurring during the commission of aggravated burglary nor during the commission of the misdemeanor of domestic violence as were advanced by Appellant to support his request for the involuntary manslaughter instruction. Appellant does not separately argue in his Brief why an involuntary manslaughter instruction would be applicable concerning this count nor does he identify where in the record a request or argument was presented relative to

this count.[27] A different analysis is necessary to determine the applicability of an involuntary manslaughter instruction with regard to Count Three. The jurors may have based their verdict with respect to Count Three upon an omission to act theory separate and apart from Appellant striking Davis with his elbow.

{¶332} However, as noted supra, such analysis is not necessary. During earlier discussions regarding the jury instructions, the trial court determined an instruction on the lesser-included offense of murder for Counts One and Two was warranted. Prior to closing arguments, the trial court and the parties reviewed corrections to the proposed instructions. The trial court then stated, "Now, what I have left open then is whether the Court is going to give an instruction on voluntary manslaughter or the Court is going to give an instruction on involuntary manslaughter and whether count three has a lesser included." February 12, 2008 Tr. at 29. The parties argued their respective positions. After denying Appellant's requests for instructions on the lesser-included offenses of voluntary manslaughter and involuntary manslaughter as to counts One and Two, the trial court noted:

{¶333} "The Court: That leaves the final issue of, ah, does count three need a lesser included offense.

{¶334} "State of Ohio?

---

[27] The trial court merged Count Three with Count Two for sentencing only and proceeded to sentence Appellant on Count Two.

{¶335} "Ms. Hartnett: If I could just have a second, Your Honor.

{¶336} "We would not request that, Your Honor.

{¶337} "The Court: Counsel for the defendant?

{¶338} "* * *

{¶339} "Ms. Ranke: Judge, we do not believe that there needs to be the lesser included of murder with regard to Count Three, * * *

{¶340} "The Court: Can I just say then you all are in agreement?

{¶341} "Ms. Hartnett: Yes, sir.

{¶342} "The Court: Is that right?

{¶343} "Ms. Ranke: That's right."

{¶344} Id. at 39-40.

{¶345} Based upon the foregoing, I find Appellant specifically declined an instruction on a lesser-included offense with respect to Count Three. Accordingly, I find no error in failing to instruct on the lesser-included offense of involuntary manslaughter as it relates to Appellant's conviction by the jury of Aggravated Murder in Count Three.

{¶346} I would sustain Appellant's first assignment of error as to Counts One and Two, but overrule it as to Count Three.

/s/ WILLIAM B. HOFFMAN
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS
FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	)
	)
Plaintiff-Appellee	)
	)
-vs-	)
	)
BOBBY LEE CUTTS, JR.	)
	)
Defendant-Appellant	)
	)

JUDGMENT ENTRY

Case No. 2008CA00079

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed.

Costs assessed to Appellant.

/S/ JOHN W . WISE

/S/ PATRICIA A. DELANEY

APPENDIX B

THE SUPREME COURT OF OHIO

Case No. 2009-1600

[Dated December 2, 2009]

State of Ohio	)
	)
v.	)
	)
Bobby Lee Cutts, Jr.	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Stark County Court of Appeals; No. 2008CA00079)

/S/THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

No. 09-1056

In The Supreme Court of the United States

BOBBY LEE CUTTS, JR.,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Stark County

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN D. FERRERO,
Prosecuting Attorney,
Stark County, Ohio

RONALD MARK CALDWELL*
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
KATHLEEN O. TATARSKY
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
STARK COUNTY PROSECUTOR'S OFFICE
110 Central Plaza, South
Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965
RMCaldwe@co.stark.oh.us

**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A jury found Bobby Lee Cutts, Jr., guilty of the murder of his girlfriend, Jessie Marie Davis, who was nine-months pregnant with his daughter, as well as guilty of the aggravated murder of their unborn but viable daughter, Chloe, during a late night visit to her home. As a result of his convictions, Cutts is serving a term of imprisonment of life, with parole eligibility after serving 57 years. The questions presented in his appeal are:

1. Whether Cutts is entitled to this Court's review of issues he has raised in the state courts below that raise no federal claim, apart from a generalized due process claim, and instead are primarily challenges to state court application of state law.

2. Whether Cutts is entitled to this Court's review of issues where he is simply seeking correction of alleged errors by the state courts below in the application of relevant law to the facts.

3. Whether Cutts is entitled to this Court's review of issues related to jury selection and composition when he has chosen not to include as part of the record on appeal any transcript of the extensive jury review and selection proceedings.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	1
REASONS FOR DENYING THE WRIT	9
I. Inconsistent Jury Verdicts	9
II. Change of Venue – Pretrial Publicity	12
III. Juror Who Searched	17
IV. Lesser Included Jury Instruction – Involuntary Manslaughter	18
V. Jury Selection – Ohio Driver's Licenses	20
VI. Grand Jury Testimony	24
VII. Blake's Hearsay Statements	26
VIII. Other Acts Evidence – Character Evidence	31
IX. Consecutive Sentences – Allied Offenses of Similar Import – Merger	33
X. Capital Specifications in Indictment	35
CONCLUSION	37

TABLE OF AUTHORITIES

Page

CASES

Berghuis v. Smith, ___ U.S. ___ (decided March 30, 2010), 2010 WL 1189555 22

Crawford v. Washington, 541 U.S. 36 (2004) 27, 29, 30, 31

Davis v. Washington, 547 U.S. 813 (2006) 30, 31

Dowling v. United States, 493 U.S. 342 (1990) 10

Dunn v. United States, 284 U.S. 390 (1932) 10

Duren v. Missouri, 439 U.S. 357 (1979) 22

Estes v. Texas, 381 U.S. 532 (1965) 14, 15, 16

Hamling v. United States, 418 U.S. 87 (1974) 10

Irwin v. Dowd, 366 U.S. 717 (1961) 13

Lockett v. Ohio, 438 U.S. 586 (1978) 26

Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) 13

Patton v. Yount, 467 U.S. 1025 (1984) 14

Sheppard v. Maxwell, 384 U.S. 333 (1966) 14, 15, 16

Standefer v. United States, 447 U.S. 10 (1980) 10

State v. Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181 19

State v. Conway, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996 20

TABLE OF AUTHORITIES – Continued

Page

State v. Cutts, Stark App. No. 2008 CA00079, 2009-Ohio-3563, 2009 WL 2170687, *appeal denied*, 123 Ohio St.3d 1509, 2009-Ohio-6210, 917 N.E.2d 812 2

State v. Fulton, 57 Ohio St.3d 120, 566 N.E.2d 1195 (1991) 22

State v. Hancock, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032 24

State v. Jackson, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173 23

State v. Jones, 91 Ohio St.3d 335, 2001-Ohio-57, 744 N.E.2d 1163 22

State v. Lovejoy, 79 Ohio St.3d 440, 1997-Ohio-371, 683 N.E.2d 1112 11

State v. Lynch, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185 20

State v. Maurer, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984), *cert. denied*, 472 U.S. 1012 (1985) 14

State v. McKnight, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, *cert. denied*, 548 U.S. 912 (2006) 14

State v. Monroe, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285 20

State v. Reynolds, 80 Ohio St.3d 670, 1998-Ohio-171, 687 N.E.2d 1358 35

State v. Siler, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534 30

TABLE OF AUTHORITIES – Continued

Page

State v. Skatzes, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215 24

State v. Steffen, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987), *cert. denied*, 485 U.S. 916 (1988) 26

State v. Thomas, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), *cert. denied*, 493 U.S. 826 (1989) 19, 20

State v. Thompson, 33 Ohio St.3d 1, 514 N.E.2d 407 (1987) 13

State v. White, 82 Ohio St.3d 16, 1998-Ohio-363, 693 N.E.2d 772, *cert. denied*, 525 U.S. 1057 (1998) 13

Taylor v. Louisiana, 419 U.S. 522 (1975) 21

United States v. Buchanan, 213 F.3d 302 (6th Cir. 2000) 22

United States v. Dotterweich, 320 U.S. 277 (1943) 10

United States v. Odeneal, 517 F.3d 406 (6th Cir. 2008) 23

United States v. Rahman, 189 F.3d 88 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) 14

Woodson v. North Carolina, 428 U.S. 280 (1976) 26

CONSTITUTIONAL PROVISIONS AND STATUTES

Ohio R.C. 2901.01(B)(1)(a) 35

Ohio R.C. 2901.01(B)(1)(a)(ii) 36

Ohio R.C. 2903.01(A) 36

TABLE OF AUTHORITIES – Continued

Page

Ohio R.C. 2903.01(B) 36

Ohio R.C. 2903.01(C) 36

Ohio R.C. 2929.04(A) 36

Sixth Amendment to the United States Constitution 21, 22

28 U.S.C. § 1863(b) 23

OHIO RULES

Ohio Crim. R. 16 25

Ohio Evid. R. 403(A) 32

Ohio Evid. R. 403(B) 31

Ohio Evid. R. 803(2) 27

STATEMENT OF CASE

In June of 2007, petitioner, Bobby Lee Cutts, Jr., killed Jessie Marie Davis, who was nine months pregnant with their unborn yet viable daughter Chloe, and then dumped them in a field to rot. Eight days later, when confronted with evidence that contradicted his alibi story, Cutts, a police officer, led the law enforcement team investigating the young mother's disappearance to the spot where he had dragged and dumped their bodies. A state grand jury indicted Cutts for the homicides of Jessie Marie Davis and Chloe. The charges in the indictment were three counts of aggravated murder with death penalty specifications, one count of aggravated burglary, two counts of gross abuse of a corpse, and one count of child endangering. A jury convicted Cutts of all of the charged offenses except for the aggravated murder of Davis, finding him guilty of the lesser offense of murder. After a penalty hearing, the jury recommended a life sentence with parole eligibility after serving thirty full years for the two aggravated murder convictions for Chloe's death. The trial court accepted the jury's recommendation for these two convictions, but merged the offenses for purposes of sentencing. This life term of imprisonment was imposed consecutively to the other prison sentences imposed for a sentence of 57 years.

On appeal, the state court of appeals overruled all of Cutts' legal claims and affirmed his convictions

and sentences. Cutts' subsequent appeal to the state's supreme court was rejected.[1]

The facts here are extensively detailed in the opinion of the court of appeals and differ significantly from the version of events Cutts set forth in his petition, which was based upon his self-serving testimony at trial, Appendix A, Petition for Writ of Certiorari.

When Patricia Porter couldn't reach her daughter, Jessie Marie Davis, on the telephone, she went to her home. Porter was concerned because Jessie was nine months pregnant, ready to deliver her baby daughter, Chloe, in about two weeks, and she had not talked with her daughter for two days.[2] When Porter arrived at Jessie's home, she found the usually well kept home in disarray. Blake, Jessie's two year old son, came running down the stairs, his diaper dripping with urine and feces. Porter asked her grandchild, "Blakey, where is Mommy?" Blake responded, "Mommy is crying, Mommy broke the table, Mommy is in the rug."[3] Scared, Porter ran through the house hollering for Jessie. Upon entering Jessie's bedroom, she saw a table and lamp knocked over and the mattress off its box springs. There was bleach poured

---

[1] *State v. Cutts*, Stark App. No. 2008 CA00079, 2009-Ohio-3563, 2009 WL 2170687, *appeal denied*, 123 Ohio St.3d 1509, 2009-Ohio-6210, 917 N.E.2d 812.

[2] Tr. I, 75.

[3] Tr. I, 84.

all over the floor with a bleach bottle sitting on the floor by the bed. Porter also noticed that the bed's blue and gold print comforter was missing.[4] Unable to find Jessie, Porter called 911 and told her daughter, Audrey, to call Cutts, Blake's father and the alleged father of Chloe.

A deputy sheriff responded to the 911 call of a missing person and possible burglary. Cutts arrived about ten minutes later dressed in his police uniform.[5] When Blake saw Cutts, he started to cry.[6]

Deputy Sheriff Sgt. Eric Weisburn responded to the scene as the lead investigator. Weisburn noticed that Cutts had a band-aid on his pinky finger and when asked about it, Cutts explained that he had cut it while cleaning the patio fireplace at his home.[7]

Weisburn interviewed Cutts who feigned ignorance of Jessie's whereabouts, concocting a story that he had made a number of calls to Jessie's cell phone when she did not drop Blake off at his home to babysit.[8]

With his attention focused on finding Jessie and her child, Weisburn asked Blake where his mommy was, and Blake replied that she was at work.

---

[4] Tr. I, 85.

[5] Tr. I, 165, 185, 190.

[6] Tr. I, 103.

[7] Tr. I, 219.

[8] Tr. I, 220, State's Exh. 1.

Spontaneously, Blake then repeated what he had previously told Porter.[9]

In a subsequent interview, Cutts continued his charade of innocence telling Weisburn about his calls to Jessie's cell phone, that he had picked up Myisha Ferrell, a friend, to babysit Blake while he was at football practice, and gave him several names of potential witnesses, again denying any knowledge of Jessie's whereabouts. Cutts even showed Weisburn the patio fireplace where he told Weisburn he had cut his pinky finger.[10]

Because Jessie was missing and was due to deliver in a couple weeks, the community organized a number of searches conducted by volunteers to try to find Jessie. Cutts participated in these search efforts.

The week following Jessie's disappearance, the FBI joined the sheriff's team of investigators to search for Jessie and Chloe.[11] The team found discrepancies in Cutts' story. For one thing, the team learned that after Cutts left a local bar, he visited Stephanie Hawthorne, a person he did not mention in previous conversations with the team. For another thing, they learned that a telephone call Cutts made to Jessie's cell phone around 7:15 a.m. on June 14, 2007 was made from a location in Summit County

---

[9] Tr. I, 223, 229.

[10] Tr. I, 242.

[11] Tr. I, 253.

and not from his residence in Plain Township as Cutts had claimed.[12]

Meanwhile, Cutts continued his charade, denying involvement with Jessie's disappearance, expressing his anguish at her loss and hopes that she would be found alive. The distraught Cutts did not report to work that week instead staying in his home visiting with his friends and family and playing video games. Cutts also gave a recorded interview with local news media.[13]

Finally, eight days after Jessie's and Chloe's disappearance, when confronted with evidence that his one call to Jessie on the morning of her disappearance was not made from his home, Cutts told the law enforcement team he would now show them where the bodies of Jessie and Chloe were located.[14] Cutts finally directed the team to an area in a park field where he had dumped the bodies of Jessie and Chloe.[15]

Dr. Lisa Kohler performed autopsies the next day. Jessie's body was in an advanced stage of decomposition. Jessie's abdomen, kidneys, liver, spleen, pancreas, eyes and brain were gone. Some bones in the neck, part of the hyoid bone and some fingertips

---

[12] Tr. I, 260.

[13] Tr. VI, 315.

[14] Tr. II, 318.

[15] Tr. II, 318.

and toes were also missing.[16] The skeletal body of Chloe was contained within Jessie's remains. The bodies were also in an advanced stage of "putrefaction," common to being left in an area exposed to the hot sun and insect penetration.[17]

Because of the condition of the bodies, Kohler was not able to determine the mechanism of death. Kohler opined, however, that if the body of Jessie would have been recovered earlier, the specific cause of death could have been determined.[18] Still, based on the autopsy, review of medical records, and law enforcement reports, the cause of death was ruled "unspecified homicidal violence . . . Ms. Davis had come to harm at "the hands of another individual."

Kohler made another significant finding – baby Chloe was viable and if she had been born at the time of her mother Jessie's death, she would have survived outside of her mother's womb. This medical opinion was shared by Dr. Craig Polifrone, Jessie's obstetrician, who examined Jessie days before her disappearance and saw a normal, happy and healthy mother, as well as a healthy and viable fetus.[19]

After killing Jessie and Chloe, Cutts picked up his high school friend, Myisha Ferrell, during the

---

[16] Tr. IV, 1264, 1271.

[17] Tr. V, 1264.

[18] Tr. V, 1283.

[19] Tr. IV, 1242, 1244, 1304, 1306.

early morning of June 14, 2007, driving his green truck. Cutts told her he needed some help and that something had happened. The pair traveled north on I-77, with Cutts talking in spurts, saying something was wrong with the baby's mother and that she was "in the back." Ferrell asked Cutts what had happened, and Cutts responded by raising his arm and putting it by his neck, never suggesting that Jessie's death was accidental.[20]

Cutts eventually stopped at an open field in a secluded area. The pair exited the truck, and Ferrell saw in the bed of the truck a body wrapped in a blanket with a pair of feet sticking out. Ferrell also saw a few bags in the back with a material resembling a burgundy print. After Cutts dumped the bodies of Jessie and Chloe, he returned to the truck. On the way back to Canton, he stopped to drop the plastic bags in a dumpster, and later stopped at a car wash where he sprayed the bed of his truck with water. In the bed of his truck, he replaced Jessie and Chloe's bodies with mulch he picked up at a gas station.[21] Cutts then threw Jessie's cell phone out the window, but only after calling her cell phone number and leaving a message claiming that she had never showed up to drop Blake off and complaining that her actions deprived him of sleep.

---

[20] Tr. II, 417-418, 421.

[21] Tr. II, 423-427.

Cutts took Ferrell back to his house where he showered and changed, asking Ferrell if she could see any marks on his chest. Ferrell saw none, but observed a cut on Cutts' pinky finger. Cutts told her he received the cut when Jessie bit his finger. Cutts then gave Ferrell $100 and told her he wished he could give her more.

At trial, Cutts testified in his own defense, giving a self-serving statement, a version the jury did not find credible. Cutts admitted to being at Jessie's home that early morning. He found Jessie on the floor in her bedroom. When she was slow in getting up, Cutts told her to hurry. When Jessie was slow in responding, Cutts ordered her again to "hurry up," because "I want to get back to bed." Cutts claimed an argument ensued that resulted in Jessie biting his finger when he waved it in front of her face. As a result, Cutts turned to leave the bedroom when Jessie allegedly grabbed him from behind to prevent him from leaving. Cutts claimed that he accidentally swung his elbow to ward her off of him.

According to Cutts, this swing of his elbow landed in Jessie's throat area,[22] and she hit the floor very hard. Getting no response from Jessie, Cutts did not call 911, instead trying CPR. Cutts checked her pulse and found none. When CPR was unsuccessful, he started chest compressions. He next found a bottle of bleach, poured some in the cap and put it under her

---

[22] Davis stood 5'4" tall, while Cutts was six feet tall.

nose.[23] Jessie's cell phone was in the charger, but Cutts, claiming he could not turn it on, did not call for emergency help. Even though his cell phone was in his truck, Cutts did not use it to call for emergency help.

Cutts ultimately decided to leave in his truck with the body of Jessie and Chloe, wrapped in the truck bed in a comforter.[24] In leaving the house with the bodies, Cutts knowingly left his toddler son, Blake, in the home by himself. Cutts did nothing to alert authorities to Jessie's disappearance or to Blake's presence in the home by himself.

REASONS FOR DENYING THE WRIT

I. Inconsistent Jury Verdicts

Cutts' first claim argues that the jury's verdicts in this case are inconsistent, and thus the court of appeals erred in not vacating his convictions and in affirming the trial court's overruling his mistrial motion. Cutts' argument is not based on a federal constitutional claim, but is instead based on the state courts' application of state law. Cutts has therefore failed to assert a federal claim triggering this Court's jurisdiction, and the claim should be rejected on this ground. Assuming, however, that Cutts' claim does

---

[23] Tr. V, 210-212.

[24] Tr. V, 200.

sufficiently raise a federal claim, it nonetheless fails on the merits. First, the verdicts are not inconsistent since they involved two separate victims, as well as separate homicidal acts with differing animus for each of their deaths. In other words, the acts and mental element for the death of Jessie Davis was found to be different than the acts and mental element that resulted in Chloe's death. And second, "inconsistent verdicts are constitutionally tolerable."[25] In other words, a criminal defendant is not deprived of due process simply because the jury returns inconsistent verdicts. Thus, the trial court did not err or abuse its discretion in overruling Cutts' mistrial motion challenging the verdicts.

Since nothing under the federal constitution bars inconsistent verdicts, the court of appeals looked to Ohio law that defined the parameters for inconsistent verdicts. Under Ohio law, an indictment containing more than one count is not interdependent and an inconsistent verdict does not result from inconsistent responses to different counts. Inconsistent verdicts

---

[25] *Dowling v. United States*, 493 U.S. 342, 353-354 (1990); *Standefer v. United States*, 447 U.S. 10, 25 (1980) ("While symmetry of results may be intellectually satisfying, it is not required."); *Hamling v. United States*, 418 U.S. 87, 101 (1974) ("It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required."); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn v. United States*, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.").

arise only out of inconsistent responses to the same count.[26] The verdicts in this case were not inconsistent. The jury did return different verdicts pertaining to the deaths of Jessie Marie Davis and her unborn child Chloe, but those verdicts are based on differing animus and actions that led to each death. The crucial difference between their deaths, which Cutts ignores in his argument, is the difference in timing of the deaths. Jessie was but two weeks from her scheduled due date, and Chloe survived after her mother's death. Prompt medical attention could have saved Chloe's life, despite the fact that her mother was dead. Cutts, a trained police officer, chose, however, to do nothing and let his unborn daughter die. Since he had already perpetrated homicidal violence on Davis, Cutts was now a trespasser who had committed the crime of murder; his continued presence in the Davis residence and allowing his unborn daughter to die as a result of his actions was a callous, calculated, and purposeful decision to cause her death, separate and apart from his intent and actions vis-á-vis Chloe's mother.

Under these facts and circumstances, the verdicts in this case relative to the separate deaths of

---

[26] *See, e.g., State v. Lovejoy*, 79 Ohio St.3d 440, 1997-Ohio-371, 683 N.E.2d 1112, paragraph one of the syllabus ("The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count.").

Jessie Marie Davis and her unborn daughter Chloe were not inconsistent. His failure to act to save his daughter constitutes a separate act and a separate animus from Cutts' actions and intent in killing Davis.

II. Change of Venue – Pretrial Publicity

Cutts argues that extensive pretrial publicity about the disappearance of Jessie and his subsequent arrest was so pervasive as to preclude a fair trial. Cutts in fact makes allegations in his petition about this publicity in an attempt to show that a fair trial was impossible, allegations that are not supported by the record in this case. Cutts chose to exclude from the record on appeal a transcript of the extensive jury selection process, and the record that was made part of this appeal does not support Cutts' sweeping and exaggerated claims. The trial court had prospective jurors fill out an extensive questionnaire that focused, among other things, on pretrial publicity. In addition, the trial was delayed many months to allow community passions to die down. Finally, the record does not refute that the court extensively inquired of all jurors about what they knew about the case, and whether they could put any such knowledge aside and judge the case solely on the evidence admitted at trial and the instructions of law provided by the court. As a result of these extensive measures, which were noted by the majority of the court of appeals below and the dissenting judge, a fair and impartial jury was selected that not only resulted in an acquittal of Cutts

for the aggravated murder of Jessie, but also resulted in a recommendation of a life sentence as opposed to the death penalty for the death of Chloe. Under these facts and circumstances, Cutts was not denied a fair trial by the unsubstantiated allegations set forth in his brief.

Cutts' argument is in part a federal claim, although the primary focus of his argument is on state law. The law in Ohio is that the examination of jurors during voir dire affords the best test to determine prejudice from pretrial publicity. The mere fact that there has been extensive pretrial publicity and exposure to prospective jurors does not necessarily mean that a fair and unbiased jury cannot be chosen and that a change of venue is mandated.[27] There is no requirement that prospective jurors be totally ignorant of the facts and issues of a particular case.[28] Thus, a careful and searching voir dire is the appropriate and adequate vehicle for determining whether prospective jurors can put aside whatever they have been exposed to about the case and judge the case

---

[27] *See, e.g., State v. White*, 82 Ohio St.3d 16, 21, 1998-Ohio-363, 693 N.E.2d 772, 777-778, *cert. denied*, 525 U.S. 1057 (1998) (noting that it will be rare for a court to presume prejudice from pretrial publicity). *See also Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976) (noting that "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial").

[28] *See State v. Thompson*, 33 Ohio St.3d 1, 5, 514 N.E.2d 407, 412 (1987). *See also Irwin v. Dowd*, 366 U.S. 717, 722 (1961).

solely on the facts and law presented to them at trial.[29] Finally, the trial court's decision regarding a change of venue is reviewed under the deferential abuse of discretion standard – that the court's ruling will be affirmed unless it is unreasonable, arbitrary, or unconscionable.[30]

Cutts failed to include the transcript of the voir dire in this case to show that prospective jurors could not be fair and impartial. These assertions, apparently based solely on the jurors' questionnaire answers, cannot be supported with any reliability without a review of the voir dire itself. Under these facts and circumstances, Cutts has failed to satisfy his burden of showing an abuse of discretion in the trial court's ruling on his motion for change of venue.[31]

---

[29] *See, e.g., State v. Maurer*, 15 Ohio St.3d 239, 252, 473 N.E.2d 768, 781-782 (1984), *cert. denied*, 472 U.S. 1012. *See also Patton v. Yount*, 467 U.S. 1025, 1035 (1984).

[30] *See, e.g., State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶¶ 60-61, *cert. denied*, 548 U.S. 912 (2006).

[31] *See, e.g., United States v. Rahman*, 189 F.3d 88, 121-122 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) (upholding denial of change of venue ruling by then District Judge Michael B. Mukasey in high publicity trial for seditious conspiracy arising from plots to bomb buildings, tunnels, and bridges in New York City and approving of Judge Mukasey's searching voir dire).

Cutts relies upon this Court's decision in *Sheppard*[32] and *Estes*[33] in making his federal claim. Neither case, however, is instructive or applicable to Cutts' specific claim. Both cases dealt with the impact of pretrial publicity on the criminal trial, but they also focused on the conduct of the trial itself. Cutts makes no claim in his appeal that his trial was conducted in a carnival environment because of the presence of the press and the trial court's failure to protect the jury from media contamination, as was the case in both *Sheppard* and *Estes*.

In *Sheppard*, for example, there was extensive pretrial publicity relating to the brutal murder of Dr. Sam Sheppard's wife. This Court reversed his Dr. Sheppard's murder conviction not on this basis alone,[34] however, but on the failure of the trial court to protect him from inherently prejudicial publicity and to control disruptive influences of the media in the courtroom during the trial. This Court specifically stressed the "carnival atmosphere at trial" in its opinion, and the failure of the trial court to take measures to prevent this denial of due process. Cutts does not claim that his criminal trial resembled in any way

---

[32] *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

[33] *Estes v. Texas*, 381 U.S. 532 (1965).

[34] *Sheppard*, 384 U.S. at 354-355 ("While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held.").

the "carnival" trial that characterized the *Sheppard* trial.

In *Estes*, this Court set aside a criminal conviction based again on pretrial publicity as well as the media's impact on the trial itself. Unlike the situation in *Sheppard*, there was a change in venue in *Estes*, as well as a sequestration of the jury, yet the media coverage of the trial turned the jurors into celebrities due to the judge's failure to insulate them from the media. Furthermore, this Court took exception to the failure of the trial court to take corrective measures to prevent the contamination of the jury from media coverage during the trial itself, allowing the trial to be televised in a highly sensational manner. In the instant case, however, Cutts does not make a claim that the conduct of the trial itself was compromised by contemporaneous media coverage of the trial. Instead, his claim is limited to a per se challenge to the conduct of any trial in Stark County due to the pretrial publicity.

Finally, Cutts claims that the pretrial publicity in this case, which was not only local, but also statewide and national, was so pervasive and sensational that no unbiased jury could be selected in Stark County. Yet, since this same pretrial publicity was present throughout Ohio, Cutts could then make the same arguments no matter where the trial was conducted in Ohio, and regardless of the prophylactic measures implemented by the trial judge to secure an unbiased and impartial jury. Such an argument claims too

much, especially given the incomplete record in this case.

III. Juror Who Searched

Cutts argues that his constitutional right to a trial by a fair and impartial jury was violated when the trial court denied his request to remove a juror who had participated in the search for Jesse and Chloe while they were missing. His argument is essentially a per se claim since he cannot demonstrate that the juror was in any way biased or partial, based upon the partial record Cutts has opted to have reviewed. The sole connection that the juror in questions had to this case was her participation in the search for Jesse and Chloe in Stark County, where nothing was found since Cutts had taken the bodies to Summit County.

Furthermore, Cutts' argument that any potential juror who either participated in the search for Jessie and Chloe is per se a partial and biased juror is without merit. The search was for missing persons who may or may not have been the victims of criminal conduct. The search was not for the killer of Jessie and Chloe. Furthermore, the search did not uncover any evidence for the simple reason that the bodies were not in Stark County, as Cutts well knew. Under these circumstances, as well as the state of the record in this appeal, Cutts has not demonstrated that he was denied a fair trial by the inclusion of a biased and partial juror.

IV. Lesser Included Jury Instruction – Involuntary Manslaughter

Cutts' fourth claim challenges the ruling of the court of appeals that affirmed the trial court's decision not to instruct the jury on the lesser included offense of involuntary manslaughter. While this challenge is couched in the terms of a general due process claim, the challenge is essentially one challenging the application of state law. Assuming, however, that Cutts has properly triggered this Court's jurisdiction by raising a nebulous federal claim, his challenge is still without merit. The trial court in this case held that the evidence presented at trial did not support the involuntary manslaughter instruction. This ruling was properly upheld on appeal since the record did not support such an instruction.

As part of its jury charge, the trial court instructed on the lesser included offense of murder, but denied Cutts' request for a charge of involuntary manslaughter (based on the misdemeanor offense of domestic violence). The jury request went to Davis' death, and not to the subsequent death of Chloe. In so ruling, the trial court noted that Cutts had pursued a complete defense vis-á-vis Davis' death.

Cutts argues that the evidence could lead the jury to the conclusion that Cutts recklessly caused Jessie's death as a proximate result of committing the misdemeanor offense of domestic violence. This argument, however, was undercut by Cutts' defense at trial, which was the complete defense of accident.

Cutts testified that he swung his elbow in an effort to get away from Jessie, and that he did not intend to strike the pregnant woman in the throat, causing her apparently immediate death. Cutts did not testify that he recklessly struck Jessie, but instead that he never intended to strike her. Thus, the evidence at trial did not support the requested instruction for involuntary manslaughter, which would have required Cutts to have admitted to striking Jessie with the intent of harming her. No crime was therefore committed, according to Cutts, since he was only trying to slip Jessie's grasp of him, and did not act recklessly in striking Davis in committing the offense of domestic violence.

The ruling of the court of appeals in this case was consistent with Ohio law governing such jury instructions. The issue in this claim is whether the evidence supported an instruction on the lesser included offense of involuntary manslaughter.[35] The Ohio Supreme Court held in 1988 that involuntary manslaughter is a lesser included offense of aggravated murder.[36] The state supreme court has continuously followed this holding in *Thomas* in reviewing this

---

[35] *See State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

[36] *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph one of the syllabus, *cert. denied*, 493 U.S. 826 (1989).

specific claim.[37] But the court has also followed the other requirement for a lesser-included-offense instruction set forth in *Thomas* – that sufficient evidence is presented that would allow a jury to reject the greater offense and to find the defendant guilty of the lesser included offense.[38] The supreme court noted in *Thomas* that a defendant must show more than the fact that one offense is a lesser included offense – he must also show that "the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense."[39] Under this standard, therefore, the courts below correctly followed Ohio law in holding that the evidence presented in this case did not warrant a jury instruction for involuntary manslaughter.

V. Jury Selection – Ohio Driver's Licenses

Cutts' fifth claim once again fails to raise a clear claim under the federal constitution, and instead takes issue with how the state courts below applied state law. In this case, Ohio permits the jury pool to be selected from the rolls of registered voters. Cutts

---

[37] *See, e.g., State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 132; *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 36; *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 79.

[38] *See Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶ 134.

[39] *Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286, at paragraph two of the syllabus.

argues that this statutory scheme is flawed and discriminatory, and that the trial court should have selected this pool from a list of Ohio driver's license holders in Stark County. Since Cutts has failed to raise a clear federal claim, he has failed to properly invoke this Court's jurisdiction on this claim. In addition, his claim was without merit under Ohio law. Finally, Cutts' factual claims made in support of this challenge are not supported by the partial record in this case.

Cutts' argument ignores the precedent of this Court and the Ohio Supreme Court applying federal and state law, which have held that use of voter registration rolls to select juries does not violate a criminal defendant's right to a fair and impartial jury that represents a fair cross section of the community.

The Sixth Amendment to the United States Constitution does not require that petit juries "mirror the community and reflect the various distinctive groups in the population."[40] The Sixth Amendment, however, does require that the method used for selecting the groups from which juries are drawn "must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[41]

---

[40] *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

[41] *Taylor*, 419 U.S. at 538.

In order to make this showing of a prima facie violation of the Sixth Amendment's fair cross section requirement, a criminal defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[42] The Ohio Supreme Court has specifically followed and applied this *Duren* standard.[43]

For purposes of fair-cross-section analysis, African-Americans are a distinctive group.[44] With regard to the second prong of the *Duren* standard, Cutts has failed to demonstrate in this partial record that excludes jury selection that African-Americans in Stark County are unfairly represented in venires relative to their numbers in the community. Finally, with regard to the third prong of the *Duren* standard,

---

[42] *Duren v. Missouri*, 439 U.S. 357, 364 (1979). *See also Berghuis v. Smith*, ___ U.S. ___ (decided March 30, 2010), 2010 WL 1189555 (reaffirming the *Duren* standard in applying to a federal habeas corpus challenge to the alleged exclusion of women from jury pools).

[43] *State v. Fulton*, 57 Ohio St.3d 120, 566 N.E.2d 1195 (1991), paragraph two of the syllabus (reviewing systematic, *per se* exclusion of persons of the Amish religious faith).

[44] *State v. Jones*, 91 Ohio St.3d 335, 340, 2001-Ohio-57, 744 N.E.2d 1163, 1172-1173. *See also United States v. Buchanan*, 213 F.3d 302, 309-310 (6th Cir. 2000).

use of the voter registration rolls does not result in systematic exclusion of African-Americans in Stark County since this method is not a vehicle that is designed to or results in their systematic exclusion.[45]

Finally, Cutts has failed to adequately preserve this issue for appellate review by his failure to include a transcript of the voir dire and jury selection process. He thus cannot make a factual basis for his systematic-exclusion argument. Under these facts and circumstances, he has failed to demonstrate unfair representation of African-Americans on Stark County juries, as well as on his particular jury, or that such alleged under-representation resulted from a systematic exclusion of that group by the state.[46]

---

[45] *See, e.g., State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶ 66.

[46] In addition, federal jury pools are also drawn from voter registrations under 28 U.S.C. §1863(b), and constitutional challenges to this selection method have been rejected. *See United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008) ("The circuit courts are " 'in complete agreement that . . . neither the Act nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population.' ") (citing list of cases); *United States v. Test*, 550 F.2d 577, 587 n.8 (10th Cir. 1976); *United States v. Forest* (C.A. 6, 2004), 355 F.3d 942, 953-954, *cert. denied*, 543 U.S. 856 (2004) (rejecting *Duren* challenge to jury pools in Akron on basis that African-Americans are underrepresented).

VI. Grand Jury Testimony

Cutts argues that he was denied due process by the trial court declining to require the prosecution to disclose grand jury testimony. Cutts had sought the disclosure of the grand jury testimony of Courtenay Robinson, Adrena Snell, Stark County Sergeant Weisburn, various FBI agents and Richard Mitchell. The courts below held that Cutts had not shown a particularized need for such testimony based upon applicable state law. As such, Cutts once again raises a state law claim that does not trigger this Court's jurisdiction. Assuming that jurisdiction has been triggered, however, Cutts' claim is nonetheless without merit since he did not show a particularized need for this testimony.

Under Ohio law, grand jury proceedings are secret and an accused is not entitled to inspect grand jury material either before or during trial unless the ends of justice require it. In other words, the defendant must show a particularized need and disclosure that outweighs the need for secrecy. The decision whether to release grand jury testimony is within the discretion of the trial court and will not be reversed absent an abuse of discretion. The standard is not different for a death penalty case.[47]

---

[47] *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215.

Before trial, Cutts filed two motions to disclose grand jury testimony. The motions were denied based upon a finding by the trial court that Cutts had failed to demonstrate a particularized need.[48] The trial court did not abuse its discretion in so ruling, especially since Cutts' attempts were nothing more than a fishing expedition to circumvent the criminal rules of discovery. The State had complied with the discovery requirements of Ohio Crim. R. 16 and provided to Cutts the names of the witnesses it intended to call at his trial and the inculpatory statements of the co-defendant Myisha Ferrell.

Cutts uses the testimony of Richard Mitchell that Cutts had previously threatened to "kill that bitch and throw her in the woods" as proof of his pretrial need for the grand jury testimony. Yet, Cutts did not ask for the pretrial disclosure of Mitchell's grand jury testimony and the statement was not made to law enforcement personnel. What is more, the State disclosed the name of Richard Mitchell to Cutts as a potential witness and indeed Cutts' investigator interviewed him.

Cutts also claims that he demonstrated a particularized need for grand jury testimony of FBI agents and law enforcement officers to show the evidence of aggravated burglary, as alleged in the indictment, an allegation also set forth in Cutts' unsuccessful motion to dismiss. Cutts ignores Ohio law that holds

---

[48] Tr. Motion Nov. 16, 2007, 16.

that any privilege to be on and remain on property is revoked when an act of violence is directed against the person holding the ability to revoke the privilege of initial entry.[49]

Finally, Cutts argues that he was entitled to the disclosure of this grand jury testimony due to the simple fact that his case was a capital case. As a result, Ohio's law that requires a showing of a particularized need for grand jury testimony to warrant disclosure of it violates this Court's basic capital jurisprudence that regards the death penalty as different from other, non-capital cases. The cases Cutts relies upon for this proposition, however, deal with the requirement that the capital jury's discretion should not be limited in its consideration of mitigating factors in order to reach an individualized sentencing decision, and do not stand for the proposition advanced by Cutts.[50]

VII. Blake's Hearsay Statements

Cutts challenges the admission of the hearsay statements of his two year old son, Blake, whom Cutts had abandoned after killing Blake's mother and removing her from the house. When Jessie's mother finally came to the house two days later to check on

---

[49] *See State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987), *cert. denied*, 485 U.S. 916 (1988).

[50] *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Jessie, Porter not only discovered that her pregnant daughter was missing, but that Blake had been left in the house by himself. The trial court admitted Blake's statements to his grandmother on the ground that the statements constituted excited utterances, and were thus admissible under Ohio Evid. R. 803(2).[51] The trial court also admitted Blake's statements to Detective Weisburn on the ground that the statements were made in response to an ongoing emergency, i.e., the unexplained disappearance of his pregnant mother. The court of appeals upheld the trial court's ruling, holding that the admission of Blake's statements did not violate *Crawford*.[52] These rulings were consistent with this Court's developing jurisprudence post-*Crawford*.

The trial court conducted a pretrial hearing to determine the admissibility of Blake's statements. Both Porter and Sgt. Weisburn testified at this pretrial hearing. Porter testified that when she arrived at Davis' home two days after hearing from her daughter last, she noticed that Davis' purse was all over the floor. Blake then came downstairs upon hearing his grandmother. Porter smelled him before she saw him since his diaper was wet and soiled after not being changed for two days. "Where is Mommy?" Porter asked her grandson. "Mommy crying. Mommy

---

[51] Ohio Evid. R. 803(2): "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

[52] *Crawford v. Washington*, 541 U.S. 36 (2004).

broke the table. Mommy in the rug," was the toddler's response. Instead of his friendly and smiley self, Blake just had a very blank stare upon going to his grandmother.[53]

Sgt. Weisburn testified that he responded to the Davis residence on the morning of June 15th to investigate a missing pregnant woman. He ascertained that the toddler Blake was apparently left alone in the home for two days. His primary concern was the location and well-being of this very pregnant woman. In an effort to find out where Jessie might be, Weisburn talked with Blake. The toddler repeated his words, that his mother was crying, that she broke the table, and that she was in the rug. Blake then stopped coloring and looked out the window in the direction of the Davis home and said, "Daddy's mad."[54]

Blake's statements to Porter qualified as an excited utterance, and that those statements to her and to Sgt. Weisburn were non-testimonial since they were elicited in response to an ongoing emergency – the unexplained and prolonged disappearance of a young pregnant mother who was but two weeks from her delivery date leaving her purse and her two year old son behind. The primary purpose of both Porter and law enforcement was locating Davis and locating

---

[53] Tr. Motion Feb. 1, 2008, 8-13.

[54] Tr. Motion Feb. 1, 2008, 42, 44-47, 51-52, 53-54.

her as soon as possible given her pregnant condition and her unexplained disappearance.[55]

At trial, while Cutts did object to the testimony of Sgt. Weisburn with regard to Blake's statements to him,[56] which was overruled by the trial court, Cutts did not object to the trial testimony of Porter concerning Blake's statements to her.[57] Given that Blake's statements to his grandmother are identical to the statements the toddler gave to Sgt. Weisburn, Cutts' challenge to the admission of the latter statements is without merit since he cannot demonstrate prejudice from the admission of the statements to Sgt. Weisburn since he did not object to those same statements to Porter.

The courts below, in making their *Crawford* rulings that the primary purpose of eliciting the statements from Blake about his mother's whereabouts was in response to an ongoing emergency – the sudden and unexplained disappearance of Jessie Davis, a woman whose delivery date was two weeks away, leaving her home, her young child, and her job. The immediate location of the missing woman was not only the primary purpose of both Porter and Weisburn, but would have been the primary purpose of any reasonable and concerned person.

---

[55] Tr. Motion Feb. 1, 2008, 76-79.

[56] Tr. Motion Feb. 4, 2008, 221-227.

[57] Tr. Motion Feb. 4, 2008, 84.

The appellate court's ruling was grounded in this Court's *Davis* opinion, as well as the Ohio Supreme Court's application of *Davis*[58] in its *Siler* decision.[59] In following this Court's *Crawford* jurisprudence, the *Siler* court specifically followed this Court's *Davis* decision and differentiated testimonial statements versus nontestimonial statements on the basis of whether the objective primary purpose of the statements was to enable police assistance to meet an ongoing emergency. As *Davis* noted, if the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the statements was to establish or prove past events potentially relevant to later criminal prosecution, then the statements would be testimonial in nature, and thus come under *Crawford*'s rubric.

In the instant case, both Porter and Sgt. Weisburn were responding to an emergency – a single pregnant mother who was close to delivery who had been missing from her home for two days. This missing mother had left her two year old son home alone and alerted no one to her disappearance – not her mother, not her employer or fellow work colleagues, not her sister, not her neighbors, not anyone. In addition, signs of violence were present in her home, despite the fact that there were no signs of forced entry. The trial court's decision to believe these two

---

[58] *Davis v. Washington*, 547 U.S. 813 (2006).

[59] *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534.

people that their primary purpose in talking to Blake was to find out what had happened to his mother in order to locate and help her was not only supported by the evidence presented, but by common sense and compassion. Davis' disappearance was in fact an ongoing emergency for several days after she was discovered missing. The appellate court's ruling was thus in accordance with this Court's *Crawford-Davis* cases.

VIII. Other Acts Evidence – Character Evidence

Cutts argues in this eighth claim that the trial court erred and abused its discretion in allowing the testimony of Jill Butler, Stephanie Hawthorne, Jennifer Sprout and Todd Porter, which he argues constituted inadmissible other acts evidence. In making this claim, Cutts only makes a general due process argument, while specifically arguing that the decisions of the courts below violated Ohio's evidentiary rule governing other acts evidence.[60] These witnesses testified to statements made by Cutts during the nine days that Jessie and Chloe were missing. Those statements included denials of the whereabouts of Jessie and her baby and hopes that they were still alive showing Cutts' state of mind and activities during this period. Cutts concedes relevance, but argues that

---

[60] *See* Ohio Evid. R. 403(B).

their probative value was outweighed by unfair prejudice. Again, Cutts' claim is primarily a state law claim.

Under Ohio law, the admission or exclusion of evidence rests within the sound discretion of the trial court. In order to find an abuse of discretion. Ohio Evid. R. 403(A) provides that '[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. The testimony of Butler was relevant, not because it demonstrated Cutts' marital infidelity, but because she had contact with him on June 13, 2007, the day before the murders, and communicated with him during the nine days that Jessie and Chloe were missing. She visited him at his home and observed his demeanor. Similarly, Sprout talked with Cutts while Jessie and Chloe were missing and observed Cutts crying, saying "he can't believe she is missing." Cutts went to visit Hawthorne after he left Champs Bar and helped to establish a time line for his activities on June 13. He arrived at Hawthorne's home at 1:00 a.m. and stayed until 2:00 a.m. The testimony about Hawthorne's terminated pregnancy of Cutts' child, which occurred in June, 2007 was offered as evidence of motive. And Sprout was offered because it established the time line for the murders.[61] Cutts did not tell Weisburn that he visited

---

[61] Tr. II, 535, Tr. III, 623, 644.

Hawthorne that night and her name was discovered when Cutts' cell phone records were obtained.

While the search for Jessie and Chloe continued, Todd Porter, a sportswriter for the *Canton Repository*, was contacted by Mitchell, then Cutts' friend, so that Cutts could tell his side of the story. When Porter arrived, he conducted the taped interview. In that interview, Cutts denied he knew anything about the disappearance of Jessie and hoped that she would be found alive.[62] The interview with Porter became even more significant when Cutts testified, displaying the fake emotional responses he was able to generate when the spotlight was on him.

This evidence had probative value because it went to the heart of the State's burden of proof – that Cutts intended to murder Jessie and her unborn child that night and dispel the myth generated by the defense that it was an accident. The testimony demonstrated his attempts to cover up his crimes.

IX. Consecutive Sentences – Allied Offenses of Similar Import – Merger

Cutts argues that the trial court erred in imposing maximum, consecutive sentences in this case for his convictions for aggravated murder, murder, and aggravated burglary. He specifically argues that

---

[62] Tr. III, 818.

the maximum and consecutive sentences are not supported by facts or law, and asserts that the offenses constituted allied offenses of similar import under Ohio law. Once again, Cutts does not make a federal constitutional argument in making this challenge. In addition, his factual argument hinges upon whether the offenses were committed separately or with a separate animus. In essence, Cutts is urging this Court to correct the errors allegedly committed below by the courts in applying state law. Not only does Cutts' argument fail to properly invoke this Court's jurisdiction, but the argument also seeks to have this Court correct the factual determinations of these lower courts. Finally, the evidence did establish a separate animus for the two homicides.

Cutts argues that the offenses he was convicted of constituted allied offenses of similar import under Ohio law, and thus the sentences in this case should have been merged and imposed concurrently. The court of appeals, however, correctly applied Ohio law in determining that the offenses were committed with a separate animus for each, based upon the facts in the record. There were two victims to Cutts' criminal conduct, who were subjected to the separate animus of Cutts. In addition, the aggravated burglary and aggravated murder offenses are not only not allied

offenses of similar import,[63] but the crimes were committed with a separate animus.

X. Capital Specifications in Indictment

Cutts' final argument once again makes only a general due process claim while focusing on state law. His argument deals with the definition of "person" under Ohio law, and its application to the homicide of a viable unborn child. Cutts argues that the trial court should have dismissed the particular death penalty specification that alleged he had caused the death of two or more persons. Cutts' challenge is contingent upon the definition of "person" in the Ohio criminal code, and whether that definition includes an unborn child, and one who was due to be born in two weeks. Cutts argues that his unborn daughter does not qualify as a person.

The court of appeals held as a matter of state statutory law that an "unborn human who is viable" is a person for purposes of Ohio's aggravated murder statute, as well as Ohio's aggravating circumstance of multiple homicide which makes an aggravated murder charge a capital offense. This holding involved the court's interpretation of the definition of "person" in Ohio R.C. 2901.01(B)(1)(a) to specifically include an "unborn human who is viable."

---

[63] *See, e.g., State v. Reynolds*, 80 Ohio St.3d 670, 681, 1998-Ohio-171, 687 N.E.2d 1358, 1371 (citing cases).

Aggravated murder is statutorily defined in Ohio in three ways: (1) purposeful death with prior calculation and design; (2) purposeful death while committing, attempting to commit, or while fleeing immediately after committing or attempting to commit certain felonies; and, (3) purposeful death of a person under the age of thirteen. Thus, the class of protected victims in R.C. 2903.01(C) includes children under the age of thirteen and unborn viable fetuses.

Therefore, under Ohio law, a defendant who has purposely killed a pregnant woman and the fetus inside her may be charged, assuming the other material elements of the offenses are present, with aggravated murder for each victim, i.e., the pregnant woman and her unborn child, under subsections (A), (B), and (C). The death of the pregnant woman may result in an aggravated murder charge under either R.C. 2903.01(A) or (B), or both; and the death of the unborn fetus, whether viable or not, may result in an aggravated murder charge under either R.C. 2903.01(B), or both, or under R.C. 2903.01(C) if the unborn child was viable.

In conclusion, R.C. 2929.04(A) should be construed to set forth a criminal offense (in conjunction with R.C. 2903.01). As a result, the more expansive definition of "person" under R.C. 2901.01(B)(1)(a)(ii) to include a viable fetus applies to both the aggravated murder statute and the aggravating circumstances provision of R.C. 2929.04(A). In this case, therefore, the indictment charging Cutts with purposely killing both Jessie Marie Davis and her unborn

child, Chloe, was proper under the law since Chloe qualified as a person for purposes of the aggravated murder charges and the death penalty specifications.

CONCLUSION

For the reasons set forth in this brief in opposition, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JOHN D. FERRERO,
Prosecuting Attorney,
Stark County, Ohio

RONALD MARK CALDWELL*
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
KATHLEEN O. TATARSKY
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
STARK COUNTY PROSECUTOR'S OFFICE
110 Central Plaza, South
Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965
RMCaldwe@co.stark.oh.us

**Counsel of Record for Respondent*